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Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1987

In Re:
C. William Garratt, and
Garratt & Morris, P.C.
Petitioners.

INVST Financial Group, Inc.
Respondent,

v.

Chem-Nuclear Systems, Inc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER FIRST AND FIFTH AMENDMENT RIGHTS ARE VIOLATED WHEN A DISTRICT JUDGE:

(1) IMPOSES SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11 FOR THE FILING OF AN UNSUCCESSFUL MOTION WHICH SOUGHT THE DISTRICT JUDGE'S DISQUALIFICATION FOR HIS ACTUAL OR APPARENT BIAS OR PREJUDICE AGAINST AN ATTORNEY AND HIS CLIENTS; AND

(2) DENIES THE OPPORTUNITY TO BE HEARD WITH RESPECT TO:

(A) THE CONFLICT BETWEEN THE ATTORNEY'S ETHICAL OBLIGATION TO ZEALOUSLY REPRESENT A CLIENT AND THE ATTORNEY'S PRE-FILING OBLIGATION UNDER RULE 11;

(B) MITIGATION AND EXCULPATION;

(C) THE OBJECTIVE AND SUBJECTIVE REASONABLENESS OF THE ATTORNEY'S CONDUCT; AND

(D) THE EFFORTS AND OTHER AFFIRMATIVE CONDUCT UNDERTAKEN BY THE ATTORNEY TO INVESTIGATE THE LAW AND FACTS PRIOR TO MOVING FOR THE JUDGE'S DISQUALIFICATION.

2.

WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT AN ATTORNEY HAD VIOLATED RULE 11 BY

MOVING TO DISQUALIFY A DISTRICT JUDGE FOR ACTUAL OR APPARENT BIAS OR PREJUDICE BECAUSE HIS MOTION FOR DISQUALIFICATION "ADVANCED NO NEW FACT OR LEGAL ARGUMENT TO SUPPORT A DIFFERENT RESULT" FROM THE RESULTS OBTAINED IN TWO PRIOR, UNSUCCESSFUL MOTIONS FOR DISQUALIFICATION, WHEN THE ATTORNEY HAD IN FACT ADVANCED SEVERAL NEW FACTS, INCLUDING:

(1) THE DISTRICT JUDGE'S INADVERTENT AND ERRONEOUS REFERENCE TO THE ATTORNEY AS A DEFENDANT IN THE CASE;

(2) THE DISTRICT JUDGE'S ACCEPTANCE OF OPPOSING COUNSEL'S STRAINED INTERPRETATION OF HIS AMBIGUOUS, SELF-SERVING LETTER IN ORDER TO IMPOSE THE HARSHEST OF SANCTIONS, STRIKING THE ATTORNEY'S PLEADINGS AND ENTERING A DEFAULT JUDGMENT AGAINST HIS CLIENT;

(3) THE DISTRICT JUDGE'S FAILURE TO STATE ANY REASON FOR REFUSING TO VACATE A DEFAULT JUDGMENT DESPITE THE EXISTENCE OF CLEAR AUTHORITY REQUIRING A CONSIDERATION OF THE FOLLOWING FACTORS:

(A) WHETHER THE PLAINTIFF WOULD BE PREJUDICED BY SETTING ASIDE THE DEFAULT;

(B) WHETHER THE DEFENDANT HAD A MERITORIOUS DEFENSE; AND

(C) WHETHER CULPABLE CONDUCT OF THE DEFENDANT LED TO THE DEFAULT.

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LOWER COURT OPINIONS

In Re: C. William Garratt and Garratt & Morris, P.C.; INVST Financial Group, Inc. v. *Chem-Nuclear Systems, Inc.*, Nos. 85-1731/1888 (6th Cir. 1987), *reh'g denied*, (1987).

JURISDICTIONAL STATEMENT

1. Petitioner seeks review of the March 31, 1987 Judgment of the United States Court of Appeals For the Sixth Circuit and of that Court's June 10, 1987 Order denying Petitioner's Petition For Rehearing.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS RELIED UPON

Petitioner relies upon the First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Petitioner also relies upon the Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE RELIED UPON

Petitioner relies upon 28 U.S.C. § 1254(1):

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *

STATEMENT OF THE CASE

Chem-Nuclear Systems, Inc. ("Chem-Nuclear") was a Washington corporation formed in or about 1967 for the purpose, among other things, of transporting, storing and disposing of industrial waste. INVST Financial Group, Inc. ("INVST") is a Michigan corporation involved in the business of identifying corporate acquisition candidates.

In 1981, Chem-Nuclear and INVST entered into a Finder's Fee Agreement under which INVST would locate acquisition candidates for Chem-Nuclear or its subsidiary. Under the terms of the Finder's Fee Agreement between the parties, INVST was to be compensated only upon the successful consummation of an acquisition. For transactions which were something short of a true acquisition and were identified in the Finder's Fee Agreement as "business opportunities," INVST would receive a fee which would be negotiated in good faith between the parties "under the terms and circumstances of the particular business opportunity."

A dispute arose over whether Chem-Nuclear was obligated to pay INVST anything (and, if so, what sum) under the Finder's Fee Agreement for INVST introducing Chem-Nuclear to Hanchar Industrial Waste Management, Inc. because, although Chem-Nuclear financed and managed Hanchar briefly, Chem-Nuclear lost interest in Hanchar, never exercised its option to acquire Hanchar, and did not take advantage of that business opportunity.

On June 7, 1983, a complaint was filed by INVST against Chem-Nuclear in the United States District Court for the Eastern District of Michigan. However, prior to the time of the institution of this suit, Chem-Nuclear, the Washington corporation named as Defendant, had ceased to exist by statutory merger proceedings with a Delaware corporation, documents establishing which were and remained a matter of public

record with the Secretary of State of the State of Washington. Waste Management, Inc., which owned the Delaware corporation that survived the merger retained Garratt & Morris, P.C. to defend the action.

On August 10, 1983, C. William Garratt ("Garratt") sent a letter to counsel for INVST, confirming that INVST's counsel had granted Chem-Nuclear an "indefinite extension" of time in which to respond to INVST's Complaint. Despite this absence of an Answer, discovery commenced in about September of 1983 and a status conference was held on November 8, 1983 before United States District Judge Horace Gilmore. At this status conference, neither Judge Gilmore nor INVST's counsel objected to Chem-Nuclear's not having responded to INVST's Complaint.

As discovery progressed, disputes arose over the timeliness and completeness of Chem-Nuclear's responses to interrogatories and document production requests. On June 25, 1984, counsel for INVST wrote to Garratt and demanded answers to outstanding interrogatories, concluding:

> Discovery in this matter on behalf of your client has been dilatory at best, and it appears that I will no longer be able to accommodate you with requests for extension [sic] of time with regard to any matter on this file. From this point onward, I expect timely responses to all pleadings filed in this matter and I will not hesitate to seek the Court's protection from this point onward.

(Exhibit E to Record Entry 102.)

On October 2, 1984, more three (3) months later and before INVST had even attempted to enter Chem-Nuclear's default, Garratt filed an Answer, Affirmative Defenses and Counterclaim on behalf of Chem-Nuclear. INVST thereafter brought a motion to strike alleging that the June 25, 1984 letter

had revoked all prior extensions of time and, therefore, Chem-Nuclear's Answer was untimely. On November 15, 1984, conducting his first hearing in the case, Judge Gilmore granted INVST's motion to strike Chem-Nuclear's pleadings but did not then grant INVST's request for a "default judgment".

After the Court struck Chem-Nuclear's pleadings on November 15 but before Chem-Nuclear's default was entered, Garratt filed (during the brief two weeks remaining before the November 30 dispositive motion cut-off date) a motion to dismiss and a motion for summary judgment and/or judgment on the pleadings. Garratt's *ex parte* motions to extend time to supplement those motions were unopposed and granted; thus, neither the Court nor opposing counsel then suggested that either motion violated Rule 11. INVST later filed a motion to enter Chem-Nuclear's default. A hearing was scheduled on Chem-Nuclear's two contested motions and on INVST's motion to enter Chem-Nuclear's default on January 17, 1985.

The January 17, 1985 hearing on the above-mentioned motions began by Garratt's partner attempting to move for the disqualification of Judge Gilmore:

> *Mr. Morris:* May I raise a preliminary matter with the Court before [INVST's counsel] proceeds with the motion for default judgment?
>
> *The Court:* What is that?
>
> *Mr. Morris:* E. Michael Morris appearing on behalf of the Defendant. As a preliminary matter, before we get into the substantive motions, Your Honor, we were going to have a respected attorney in the Detroit area make an oral motion today for recusal. Due to a scheduling problem, he could not be here. At this time I would, for the record, like to make an oral request for recusal.

The Court: You have made the oral motion. I will deny it. It is not supported by affidavit. I do not have to refer it to another Judge. Proceed.

Mr. Morris: Thank you, Your Honor. For the record, I would have liked to have stated the facts on the record.

The Court: I don't think it is necessary to state the facts, Mr. Morris. If you had a motion for recusal, you could have filed a proper motion and it would have been heard by another Judge. You did not do so.

(Record Entry 144, p. 3–4).

The January 17 hearing continued with Judge Gilmore refusing to consider the merits of Chem-Nuclear's motions to dismiss, for summary judgment, and for judgment on the pleadings ostensibly because he had stricken Chem-Nuclear's Answer, Affirmative Defenses and Counterclaim at the prior hearing. Judge Gilmore proceeded further; he entered Chem-Nuclear's default; he scheduled a hearing for entry of a default judgment the next week on January 24; he found Garratt in violation of Rule 11 for filing Chem-Nuclear's dispositive motions, and he scheduled a hearing for imposition of sanctions in two weeks on January 31. (Record Entry 144, p. 21). In an Order entered on April 17, 1985, Judge Gilmore summarily refused to set aside the default. (Record Entry 110.)

When the third hearing was held a week later on January 24, 1985, Garratt followed the procedure the Judge himself had suggested to be proper a week earlier. Garratt filed a written motion to disqualify Judge Gilmore under both 28 U.S.C. § 144 and 28 U.S.C. § 455, seeking that another judge be assigned to all further proceedings, whether against Chem-Nuclear or Garratt. The recusal motion was replete with documents and facts offered to demonstrate Judge Gilmore's actual or apparent bias against Garratt and his clients in prior cases; in one, Judge Gilmore had voluntarily recused himself and, while other

judges declined to disqualify Judge Gilmore in other cases, neither those judges nor Judge Gilmore suggested a Rule 11 violation or bad faith on Garratt's part. The disqualification motion in the instant case was referred to United States District Judge Robert DeMascio, who declined to hold a hearing, denied the disqualification motion and suggested to Judge Gilmore that Rule 11 sanctions might be appropriate for the written motion seeking disqualification:

> [i]nitially, we note that, under [28 U.S.C.] § 144, actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. Personal bias based upon extrajudicial actions must be shown. *Southerland* v. *Irons*, 628 F.2d 978 (6th Cir. 1980).
>
> It is clear to this court that defendant is claiming no personal bias on the part of Judge Horace Gilmore. Defendant's allegations of bias all concern judicial actions taken by the presiding judge in the present and past cases in which defendant's counsel has appeared. This is an insufficient basis for disqualification.
>
> Additionally, we have reviewed the procedural history of this lawsuit. We are of the opinion that, in bringing this motion, defendant is compounding a demonstration of lack of good faith in the defense of this action. While we believe that this motion presents an appropriate basis for the imposition of sanctions under Fed. R. Civ. P. 11, such action is more appropriately left to the assigned judge.

(Record Entry 99).

On April 18, 1985 Judge Gilmore also ruled that sanctions should be imposed personally upon Garratt for filing the motion to disqualify and referred determination of the dollar amount of sanctions for all three motions to United States Magistrate Paul J. Komives, acting as a Special Master pursuant to F.R. Civ.P. 53.

Magistrate Komives conducted hearings on the sanctions to be imposed against Garratt, but, given the specific issue referred to him, the Magistrate declined to consider the testimonial and documentary evidence offered by Garratt and his witnesses concerning mitigation, exculpation, or other equitable considerations.

While Garratt made specific offers of proof, especially important was the trial court's refusal to consider the expert testimony of a member of the Attorney Grievance Board to the effect that the duty of zealous representation imposed on Garratt by Canon 7 of Michigan's Code of Professional Responsibility required Garratt to file all three (3) motions and that each motion was objectively reasonable within the meaning of Rule 11. On August 6, 1985, the Magistrate recommended that sanctions be imposed against Garratt in the amount of Fourteen Thousand Two Hundred Thirty Eight Dollars and Seventy Five Cents ($14,238.75) for the three Chem-Nuclear motions. (Record Entry 130). The amount equalled the computerized hourly rate of INVST's counsel for all time allegedly spent by INVST's counsel responding to those three motions, whether or not INVST was ever charged or paid that amount. Garratt objected to this recommendation on nine specific grounds, including, *inter alia,* that the Magistrate: (1) erroneously presumed that any time spent by INVST's counsel during a relevant time period must have concerned the three motions; (2) failed to consider well-established factors for determining a proper fee amount; and (3) refused to allow Garratt to present detailed and substantive evidence in justification of his conduct and in mitigation of the sanctions. (Record Entry 132).

On October 9, 1985, Judge Gilmore entered an Order For Payment Of Actual Attorney Fees To Plaintiff As Sanctions Against C. William Garratt (Record Entry 163), adopting the Magistrate's recommended sanction in full with the exception of one minor adjustment of Seventy One Dollars and Twenty

Five Cents ($71.25). Garratt then filed a timely Notice of Appeal in the United States Court of Appeals For The Sixth Circuit (Record Entry 167).

Garratt's appeal of the imposition of sanctions was consolidated with the appeal by Chem-Nuclear's new counsel of the entry of Chem-Nuclear's default and of the default judgment for $82,000 plus interest. Garratt was represented at oral argument by former U.S. Attorney General Ramsey Clark. In an opinion decided and filed on March 31, 1987 (see Appendix A attached hereto), the Court of Appeals set aside the default judgment against Chem-Nuclear:

> The presence of an agreement granting an extension of time to answer, the ambiguity of the attempted revocation of that extension, and a lack of action on the part of INVST after the purported revocation lead us to conclude that the default judgment against Chem-Nuclear was the result of excusable neglect on the part of Garratt. To prevent manifest injustice to Chem-Nuclear, the default judgment must be set aside so that the case may proceed on the merits.

(Appendix A, attached hereto, at p. 14).

The Court of Appeals also addressed briefly Judge Gilmore's refusal to hear Chem-Nuclear's motion for summary judgment on the merits, and specifically directed the trial court to consider the merits of that motion filed by Garratt upon remand.

With respect to the Rule 11 sanctions imposed against Garratt, the Court concluded that such sanctions were properly assessed as to Garratt's motion for disqualification of Judge Gilmore:

> Garratt's motion for recusal of Judge Gilmore violates all three sanctionable circumstances of Rule 11. The motion was not well-grounded in fact, was not warranted by existing law or a good faith argument for the extension of

> existing law, and was filed for the improper purpose of delaying the default judgment hearing.
>
> Prior to Judge DeMascio's denial of Garratt's motion to recuse Judge Gilmore, Judges Guy and Churchill, fellow district judges of the Eastern District of Michigan at the time, had dismissed similar motions filed by Garratt to recuse Judge Gilmore. The basis for each motion was identical, and both times the motion failed. In filing the motion for recusal in the instant case, Garratt advanced no new fact or legal argument to support a different result.
>
> Further, there was absolutely no legal basis upon which Garratt could have reasonably believed that adverse rulings in prior cases were sufficient to show bias. This court, in *Southerland* v. *Irons,* 628 F.2d 978, 980 (1980), explicitly held that 'actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. . .'

(Appendix A, attached hereto, at pp. 18–19).

The Court of Appeals rejected Garratt's assertion that his circumstances represented an exception to the general rule of *Southerland, supra,* and said it could distinguish the cases cited by Garratt for the exception or extension of law on which Garratt's disqualification motion was based.

With respect to Garratt's motion on Chem-Nuclear's behalf to dismiss INVST's Complaint after Chem-Nuclear's pleadings were stricken but before default was entered, the Court affirmed Judge Gilmore's imposition of sanctions and concluded that "even a cursory review of [Federal Rule of Civil Procedure] Rule 12 would have revealed that the defense lacked any foundation in law. . ." (Appendix A, attached hereto, at p. 20). What the Court Of Appeals failed to address was that a principal basis of Garratt's motion to dismiss was

the trial court's lack of subject matter jurisdiction due to the non-existence of the named defendant.

The Court of Appeals disagreed with Judge Gilmore, however, over the issue of whether sanctions were imposable for Garratt's motion for summary judgment on Chem-Nuclear's behalf. Judge Gilmore had found the filing of such motion sanctionable because "[i]t certainly does not make any sense to entertain a motion for summary judgment on the merits when I have prevented the defendant from filing an answer." As the Court of Appeals pointed out, however, there is no requirement that an answer first be filed before a defendant can move for summary judgment, and Garratt's filing of such a motion on behalf of Chem-Nuclear was accordingly not sanctionable.

Because Judge Gilmore had not broken down the award of sanctions into its component parts, and because the Court of Appeals reversed the imposition of sanctions for filing of the summary judgment motion, the Court of Appeals concluded that a remand was required for a calculation of the proper amount of sanctions.

The Court of Appeals' opinion concluded with a rejection of Garratt's due process arguments. There was no mention whatsoever of Garratt's concerns over the chilling effect of Judge Gilmore's application of Rule 11.

The instant Petitioner filed a Motion For Enlargement Of Time In Which To File Petition For Rehearing, which was granted by the Court of Appeals (See Appendix B, attached hereto). Petitioner's Petition For Rehearing was accordingly timely filed on or about April 17, 1987 (See Appendix C, attached hereto), but was denied on June 10, 1987 (See Appendix D, attached hereto). Petitioner now seeks review by writ of certiorari of the Court of Appeals' decision.

Following the issuance of the Court of Appeals' March 31, 1987 opinion, Chem-Nuclear and INVST engaged in successful settlement negotiations. Petitioner is informed that the underlying case has been settled for a total of $6,000, less than half of the amount of sanctions assessed against Garratt by Judge Gilmore.

ARGUMENT

INTRODUCTION

In The Federalist No. 78, Alexander Hamilton noted:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.

THE FEDERALIST NO. 78 (A. Hamilton).

Although Hamilton was discussing the judiciary in relation to the separation of powers between the various branches of government, his above observation is useful to help bring into sharper focus the importance of the instant Petition For Writ Of Certiorari. Unless the abuse complained of herein is checked in its incipiency and Rule 11 is confined to its proper purposes, the judiciary runs the risk of mutating into an institution with powers not even remotely contemplated by the Founding Fathers and hazardous to the political and other rights of the Constitution. Among these other rights imperiled by such overreaching under the auspices of Rule 11 are such cherished and fundamental rights as freedom of speech, the right to petition the Government for a redress of grievances, the right to counsel, the right of access to the courts, and the right to due process of law.

The instant Petition thus presents an opportunity to not only define an attorney's duty of zealous representation of clients against the sometimes competing considerations of Rule 11, but also to give teeth to the Advisory Committee On Rules' assurances that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." F.R.CIV.P. 11 Advisory Committee Note.

Until the dangerous trend represented by the lower courts' opinions in the instant case is reversed, such assurances will have a hollow ring. Indeed, the discrepancy between the Advisory Committee's aspirations and reality is readily apparent to even those outside the legal profession, as evidenced by this recent observation on the editorial pages of a major metropolitan newspaper:

> **LAWYERS HEAL THYSELVES:** After years of leniency, lawyers are being slapped with court fines for frivolous cases and offensive tactics, reprimanded and disbarred in record numbers and sued by clients for losing cases or for not winning big enough victories. *So they are shying away from practicing innovative courtroom tactics and inventing new legal theories.* It seems lawyers, who created the litigation explosion that begat this latest crackdown, have brought judicial restraint upon themselves.

THE DETROIT NEWS, 18A, Aug. 29, 1987
(emphasis added).

When the above concerns are considered in conjunction with the national debate raging over the application of Rule 11, *see, e.g.*, "The Trouble With Rule 11," Aug. 1, 1987 *ABA Journal*, pp. 87-90; "Rule 11 Changes, Blessing or Curse," Sept. 1, 1986 *ABA Journal*, p. 34, this Court's consideration of the instant case could provide timely and sorely-needed guidance on a mechanism whose potential for harm exceeds its potential for good.

I.

REVIEW OF THE COURT OF APPEALS' DECISIONS IS NEEDED TO DISSIPATE THE CHILLING EFFECT WHICH WILL RESULT FROM PERMITTING A TRIAL JUDGE TO PUNISH AN ATTORNEY FOR QUESTIONING THE JUDGE'S ABILITY TO BE IMPARTIAL IN A GIVEN CASE.

In a broad sense, a motion to disqualify a trial judge amounts to a criticism of that judge, an activity which, if appropriate, is part of an attorney's duty of zealous representation under Canon 7 of the Code of Professional Responsibility. "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting). *See also Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964); Rieger, *Lawyers' Criticism Of Judges: Is Freedom Of Speech A Figure Of Speech?*, 2 CONST.Q. 69 (1985). Such fearlessness is severely inhibited when counsel is punished with monetary sanctions for discharging that "special responsibility." *Id.*

Under the particular circumstances of the instant case, Judge Gilmore was permitted to act as accuser, fact finder, judge and executioner against the attorney who sought his disqualification. Any meaningful review of Judge Gilmore's actions was foreclosed when Judge DeMascio rigidly applied the rule of *Southerland* v. *Irons*, 628 F.2d 978 (1980) (requiring a showing of personal bias based upon extrajudicial actions), and the Court Of Appeals For The Sixth Circuit disingenuously attempted to distinguish Sixth Circuit authority carving out exceptions to the *Southerland* rule which Garratt cited. *See, e.g.*, *Nicodemus* v. *Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979); *United States* v. *Ritter*, 540 F.2d 459 (10th Cir.), *cert.*

denied, 429 U.S. 951 (1976). Under such a scenario, it is not unduly apocalyptic to contend that the Court of Appeals' decision, unless corrected, will dissuade attorneys from zealously protecting their clients' interests by calling a judge's attention to the need for disqualification where he or she has or appears to have a personal bias or prejudice concerning a party or the party's counsel.

It is important to bear in mind that the instant case presents concerns not present in this Court's recent opinion regarding judicial disqualification in *Aetna Life Insurance Company* v. *Lavoie*, ____ U.S. ____, 106 S.Ct. 1580 (1986). In *Aetna*, this Court noted that only in the most extreme cases would disqualification on the basis of allegations of bias or prejudice be constitutionally required. In the instant case, by contrast, the questions presented transcend whether disqualification is constitutionally compelled, but strike instead at the issue of whether a host of constitutional rights is implicated by punishing the mere suggestion that disqualification is appropriate.

II.

REVIEW OF THE LOWER COURTS' DECISIONS IS NECESSARY TO CLARIFY WHAT WOULD OTHERWISE BE IMPERMISSIBLY VAGUE STANDARDS AS TO WHEN AN ATTORNEY CAN SEEK THE DISQUALIFICATION OF A TRIAL JUDGE WITHOUT RISKING THE IMPOSITION OF SANCTIONS UNDER RULE 11.

Federal Rule of Civil Procedure 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or

> other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

According to the Court of Appeals, Garratt's motion to disqualify Judge Gilmore "violate[d] all three sanctionable circumstances of Rule 11. The motion was not well-grounded in fact, was not warranted by existing law or a good faith argument for the extension of existing law, and was filed for the improper purpose of delaying the default judgment hearing." Appendix A, *infra*, at p. 18. The Court's conclusion as to each of the three "sanctionable circumstances" is curious at best, and the opinion gives little or no guidance as to when a motion to disqualify will or will not violate Rule 11.

With respect to the requirement that the motion be well grounded in fact, the Court Of Appeals determined that Garratt had presented no new facts in support of such a motion than those alleged in two prior motions to disqualify which were denied. The Court made this finding despite evidence of several significant new facts, including:

1. *The trial judge's reference to the caption of this case as "INVST v. Garratt Chem-Nuclear."* While INVST noted in its Brief On Appeal before the Court of Appeals that Garratt had not moved

the trial court pursuant to F.R. App.P. 10(e) to correct the record, that rule also contemplates the possibility of such correction being ordered by the Court Of Appeals. Having made inquiries of the trial court, and recognizing the futility of his request, Garratt concluded that any necessary correction would have to come from the Court Of Appeals, which did not grant such relief. As Garratt pointed out to the Court of Appeals, however, the judge made a "Freudian slip" at his first hearing on this matter.

2. *The trial judge's acceptance of opposing counsel's strained interpretation of his own June 25, 1984 letter found by the Court Of Appeals to have been "ambiguous on its face."* Appendix A, *infra*, at p. 13. Certainly, Judge Gilmore's blind acceptance of this cryptic letter and taking one paragraph of it out of context, especially when viewed in the totality of the circumstances and the harsh result which flowed from this ambiguity, can fairly be viewed as a new fact establishing the reasonableness of Garratt's concerns over the judge's impartiality.

3. *The trial judge's entry of default and granting of a default judgment against Garratt's client and his refusal to consider Garratt's summary judgment motion on its merits.* Not only was the fact of the default and default judgment a "new fact" to support another motion to disqualify, but the manner in which it was done — without any discussion of the three factors required to be considered by *United Coin Meter Company* v *Seaboard Coastal Line Railroad*, 705 F.2d 839, 845 (6th Cir. 1983) — also justified further efforts to disqualify Judge Gilmore. Similarly, as found by the Court of Appeals, it was error for the judge to have refused to consider Chem-Nuclear's motion for summary judgment; while this error alone might not be a sufficient basis to move for the judge's disqualification, the synergistic effect of all the foregoing new facts should have been deemed sufficient to conclude that Garratt's actions were well grounded in fact, especially given the past hostility of

Judge Gilmore toward Garratt and his clients in other recent cases that are fully detailed in the trial court and appellate record.

If the above facts were not sufficient under the current state of the law to warrant some inquiry into the judge's impartiality, Garratt certainly presented a good faith argument for the extension or modification of existing law. While the lower courts' opinions treat *Southerland* v. *Irons, supra,* in a monolithic manner, the existence of such authority as *Nicodemus* v. *Chrysler Corporation, supra,* and *United States* v. *Ritter, supra,* gives Garratt a plausible argument that his circumstances were sufficiently similar to move for disqualification. While the Court Of Appeals disagreed with Garratt on this point and tried to distinguish *Nicodemus* on its *facts,* Rule 11 does not require that Garratt be correct in his view of the law. *See, e.g., Zaldivar* v. *City of Los Angeles, et al.,* 780 F.2d 823, 831 (9th Cir. 1986); *Eastway Construction Corporation* v. *City of New York,* 762 F.2d 243, 254 (2d Cir. 1985); *Robinson* v. *National Cash Register Company,* 808 F.2d 1119, 1127 (5th Cir. 1987). Assuming *arguendo* the correctness of the lower courts' position (notwithstanding *Nicodemus* and *Ritter)* that alleged bias must be directed at a party and be extrajudicial, a good faith argument for the modification of any such proposition is readily apparent from the rationale of Rule 11 itself.

One of the purposes of Rule 11 is to "streamline the litigation process," *Westmoreland* v. *CBS, Inc.,* 770 F.2d 1168, 1173-74 (D.C. Cir. 1985); another is to involve the trial judge in early and vigorous case management, *Elliott* v. *Perez,* 751 F.2d 1472, 1481 (5th Cir. 1985). Clearly, some of the central rationales behind these purposes are to conserve judicial resources and to further F.R.Civ.P. 11's goal of the "speedy and inexpensive determination of every action." The values inherent in these purposes are somewhat at odds with the rule of *Southerland* in that, while purporting to require purely extrajudicial action for disqualification, *Southerland* would require a

party, who finds himself in the position Garratt perceived Chem-Nuclear and himself to be, to not seek recusal but merely seek some appellate remedy. In this manner, one subject to "non-extrajudicial" bias or prejudice in pending litigation, however actual or apparent, is forced to bear the expense and other consequences of completing the trial process, an appeal and possible retrial just to attempt to exercise his right to an impartial hearing. Whether viewed as a modification of existing law proposed by Garratt or as applying the *Nicodemus* and *Ritter* exceptions to *Southerland,* the rules of disqualification would more closely save judicial resources, save client's funds, and otherwise promote the stated purposes of Rule 11 if a more immediate resolution of the question of impartiality (as Garratt sought) is available without fear of sanctions. In effect, then, Garratt has been subjected to Rule 11 sanctions for suggesting an exception or proposing a modification of law which would further the goals of Rule 11.

Finally, with respect to the Court Of Appeals' finding that Garratt's motion to disqualify Judge Gilmore was filed for the improper purpose of delaying the default judgment hearing, Petitioner has specifically pointed out to the Court of Appeals in a motion for rehearing the lack of factual support for such a conclusion. Unfortunately, the Court Of Appeals denied the motion without any further clarification. Independent counsel failed to appear to request disqualification on January 17, so Garratt's partner had to make an oral motion; Judge Gilmore denied it and said that it should be written; Garratt filed the written motion within one (1) week. The fact that Judge DeMascio did not immediately rule on the motion and, therefore, Judge Gilmore chose to adjourn the default judgment hearing does not warrant anything close to the lower courts' conclusion that Garratt filed the motion to delay the default judgment hearing. Indeed, when Garratt's partner first sought disqualification orally on January 17, no one knew that a default would be entered, let alone a default judgment

or the date thereof. If the instant case is permitted to stand unchanged, attorneys throughout the federal system will be aware of authority by which they can be penalized by a judge for moving to disqualify the same judge in a pending case, but will have no discernible standards to guide them as to when to abandon an important right of their clients, namely, the right to an impartial hearing.

III.

THE LOWER COURTS' DECISIONS REPRESENT AN ABERRATION IN RULE 11 JURISPRUDENCE, AND THE SEVERITY OF THE SANCTIONS IMPOSED AND IMPORTANCE OF THE RIGHTS INFRINGED REQUIRE A MORE PRINCIPLED EXPOSITION OF THE LAW

The instant Petition presents an opportunity to address a misapplication of Rule 11 which infringes on a number of important rights, yet which has not been the subject of many other reported decisions. A computerized search of all available federal decisions reveals only one other case beside the instant one which evaluated the wisdom of imposing sanctions in connection with the filing of a motion to disqualify a judge. *See In re: Attorney Walter F. Kelly*, 808 F .2d 549 (7th Cir. 1986).

In *Kelly*, an attorney in a sex-discrimination case in which abortion was apparently an issue filed an affidavit in support of the trial judge's recusal in which he alleged without qualification that the trial judge had "publicly and actively stated his opposition to abortion." *Kelly*, *supra*, 808 F. 2d at 550. In fact, the attorney had no knowledge of any such opposition by the trial judge, and his emphatic statement to that effect in his affidavit was found to be "a shot in the dark, a guess." While the

court found this assertion to be a violation of Rule 11, it decided that formal discipline was not appropriate in light of the unusual facts of the case and the possibility that the affidavit was "clumsily rather than dishonestly drafted." *Id.* at 522.

The conduct of the attorney in *Kelly* was, thus, far more egregious than any attributed to Garratt in the instant case. Counsel in *Kelly* was let off with just a warning. Contrast that result with the severe sanctions leveled against Garratt for actions which were clearly more acceptable than those in *Kelly*, and the need for further review of this matter becomes even more apparent.

Equally important, there is no indication anywhere in the *Kelly* opinion that the filing of a motion for disqualification itself could trigger Rule 11 sanctions; it was clearly the "shot in the dark" affidavit by which the attorney in *Kelly* attempted to corroborate his motion that disturbed the court, not the fact that he dared to question the judge's impartiality. Garratt, however, is sanctioned for merely questioning the judge's impartiality despite a history of discord between them and new facts showing Judge Gilmore's apparent bias and prejudice against Garratt in the instant case.

The instant case is, to date, the nadir of Rule 11 jurisprudence. Lest the chilling effect of the instant case spread and infect other cases, clients and courts, this Court should grant certiorari to help chart these dangerous and unsettled waters.

IV.

CONSIDERATION OF THE JUDICIAL CLIMATE IN THE DISTRICT OF THE INSTANT CASE AND PUBLIC PERCEPTION OF JUDICIAL INTEGRITY MILITATES STRONGLY IN FAVOR OF REVIEW

While the issues presented in the instant Petition are clearly of national importance, their particular importance to the

legal community of this District cannot be gainsaid. The recent past has dealt several blows to the public's perception of judical integrity in the State of Michigan. In November of 1986, for example, a Michigan Court of Appeals judge committed suicide shortly after his arrest on charges of soliciting a bribe. *See* Appendix F, attached hereto. And another state court remains the target of a federal investigation into allegations of corruption. *See* Appendix G, attached hereto.

While the United States District Court For The Eastern District Of Michigan has remained free of clouds of corruption since a Bankruptcy Judge resigned in the midst of scandal at the beginning of this decade, the requirement that "justice must satisfy the appearance of justice," *Offut* v. *United States*, 348 U.S. 11, 14 (1954), requires vigilance to prevent the instant case being construed by the judiciary, the bar and the public as the beginning of the end of zealous and innovative legal practice and the advent of judicial tyranny. Such impressions can grow as a result of permitting the lower courts' decisions to stand in the instant case. Further, as pointed out in the Introduction to this Section, *supra*, at least one opinion-maker in this District has already perceived that Rule 11 has curbed attorneys' creativity. By granting certiorari in this matter, this Court could not only correct the specific abuses outlined herein but could also demonstrate to the public that our system of justice is sufficiently sensitive to protecting the appearance of justice so that one can exercise his rights to seek a judge's disqualification without having that same judge act as accuser, fact finder, judge, and executioner.

REQUEST FOR RELIEF

Based upon the foregoing, Petitioner respectfully requests that this Court issue an appropriate Writ of Certiorari to the United States Court Of Appeals For The Sixth Circuit.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1731/1888

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

INVST FINANCIAL GROUP, INC., a Michigan Corporation,
Plaintiff-Appellee,

v.

CHEM-NUCLEAR SYSTEMS, INC., a Washington Corporation,
Defendant-Appellant. (85-1731)

IN RE:
C. WILLIAM GARRATT, and
GARRATT & MORRIS, P.C.,
Petitioners-Appellants (85-1888).

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 31, 1987

Before: KEITH and WELLFORD, Circuit Judges; and TODD, District Judge.*

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*The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

TODD, District Judge. This is a consolidation of two cases which arose out of a common set of facts. In INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., defendant Chem-Nuclear appeals the district court's entry of a default judgment due to the failure of Chem-Nuclear's former attorney to file an answer in a timely manner. In re C. William Garratt and Garratt and Morris, P.C. is an appeal of the imposition of sanctions upon Garratt pursuant to Fed. R. Civ. P. 11. For the reasons hereinafter stated, we REVERSE the default judgment in INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc. We AFFIRM in part and REVERSE in part the imposition of sanctions in In re C. William Garratt and Garratt and Morris, P.C.

I. FACTS

INVST Financial Group, Inc. (INVST) was a Michigan corporation engaged in the business of identifying corporate acquisition candidates. In 1981, INVST contracted with defendant Chem-Nuclear Systems, Inc. (Chem-Nuclear), agreeing to attempt to locate possible candidates for acquisition by Chem-Nuclear. A written agreement between the parties defined their relationship and described the circumstances under which INVST would be entitled to a fee.

INVST located a company named Hanchar as a potential acquisition prospect for Chem-Nuclear. A Chem-Nuclear subsidiary entered a two-year option and operating agreement to purchase all the stock of two subsidiaries of Hanchar. Chem-Nuclear's subsidiary operated Hanchar's subsidiaries for four months before deciding, for various reasons, not to exercise the option to purchase the Hanchar stock. After the option and operating agreement were terminated, INVST demanded compensation for its role in the Hanchar transaction. Chem-Nuclear refused to pay, claiming that no acquisition had taken place to trigger the agreement to pay a finder's fee.

INVST filed a diversity jurisdiction breach of contract suit against Chem-Nuclear on June 7, 1983. On August 10, 1983,

plaintiff's counsel, Mark Reizen (Reizen), granted attorney William Garratt (Garratt) an indefinite extension of time for Chem-Nuclear to answer the complaint.

On September 7, 1983, Reizen sent Garratt a letter seeking a status report. Garratt did not respond. Discovery began in September 1983, even though no answer had been filed on behalf of defendant. District Judge Gilmore held a status conference in November 1983, at which he set certain deadlines, including a motion cutoff date of December 1, 1984, and an anticipated trial date of January 1985. At the status conference, neither the lawyers nor Judge Gilmore referred to Chem-Nuclear's failure to file an answer. During the conference Garratt advised that defendant Chem-Nuclear was a Washington corporation, and Judge Gilmore instructed INVST to amend its complaint to insure complete diversity. On November 17, 1983, INVST filed an amended complaint, reflecting that Chem-Nuclear was a Washington corporation.

As the suit progressed, discovery problems arose. On June 25, 1984, Reizen sent a letter to Garratt which contained the following:

> [p]laintiff's First Set of Interrogatories were forwarded to you on February 29, 1984, and I still have not received Answers to the same. Those Answers are now long overdue, and a Motion to Compel Answers to these Interrogatories will be filed with the Court on July 2, 1984.
>
> Discovery in this matter on behalf of your client has been dilatory at best, and it appears that I will no longer be able to accommodate you with requests for extensions of time with regard to any matter on this file. From this point onward, I expect timely responses to all pleadings filed in this matter and I will not hesitate to seek the Court's protection from this point onward.

On October 2, 1984, three months after the letter from Reizen, Garratt filed an answer for Chem-Nuclear, including

affirmative defenses and a counterclaim. At that same time, Garratt responded to INVST's first set of interrogatories.

INVST had not sought entry of default between its June 1984 letter purportedly revoking the time extensions and defendant's October 1984 pleading. From June until October, the only contact between the parties was an additional discovery dispute in July.

On October 19, 1984, INVST moved to strike Chem-Nuclear's answer, counterclaim, and affirmative defenses. Chem-Nuclear responded to the motion to strike by contending that INVST's counsel had expressly agreed to grant additional time to respond; that INVST's counsel never requested a response to the pleadings; that INVST had never objected or sought any relief regarding the alleged untimeliness of the response until after it was filed; and that failure to object to the untimeliness of the response constituted a waiver or estoppel.

On November 15, 1984, at a hearing on pending motions, Garratt explained that he had not answered the complaint in a timely fashion because he had relied upon the agreement made with plaintiff's counsel. Garratt indicated that he interpreted the June 25, 1984, letter to be confined to discovery matters, and that he did not consider it to be a revocation of the extension of time granted to file an answer. Garratt also argued that plaintiff had not been prejudiced by any delay in filing an answer because discovery had proceeded and plaintiff had not sought any judicial relief as a result of the untimely answer. INVST argued that it had been prejudiced by the delay because the filing of a counterclaim and affirmative defenses so close to the discovery cutoff made adequate discovery impossible prior to a January trial date. Judge Gilmore granted INVST's motion to strike the answer and counterclaim, although the order to strike was not entered until November 30, 1984, and was not filed by the clerk until December 3, 1984.

Chem-Nuclear filed two motions before the order to strike was entered. On November 20, 1984, Chem-Nuclear filed a motion to dismiss for insufficiency of service of process on the basis that Chem-Nuclear had ceased to exist in 1982 and was therefore not amenable to suit. On November 29, 1984, Chem-Nuclear moved for summary judgment on the basis that defendant had no obligation to plaintiff, because no acquisition which would trigger the finder's fee provision of the agreement had ever occurred.

INVST moved for entry of default and default judgment on December 5, 1984. INVST also responded to Chem-Nuclear's motions to dismiss and for summary judgment, contending that the motions were "frivolous and vexatious" and were filed in bad faith. INVST sought an award of costs and fees pursuant to Fed. R. Civ. P. 11 for the alleged vexatious, harassing, and frivolous motions. On January 17, 1985, before arguments began on pending motions, a representative of Garratt's law firm made an oral motion for Judge Gilmore's recusal. Because no affidavit was presented in support of that motion, the motion for recusal was summarily denied. At the conclusion of arguments on the pending motions, the court granted plaintiff's motion for default judgment. Judge Gilmore denied Chem-Nuclear's motion to dismiss for insufficiency of service of process because it had been waived under Fed. R. Civ. P. 12(a)(1). The court described the defense of insufficiency of service of process as "outrageous" because Garratt had initially filed an answer and counterclaim on behalf of Chem-Nuclear, and only after those pleadings had been stricken did he take the position that Chem-Nuclear did not exist.

The court also denied, without consideration, defendant's motion for summary judgment. The court reasoned that because defendant's answer had been stricken, its motion for summary judgment should not be entertained. Rule 11 sanctions were imposed for both the motion for summary judgment and the motion to dismiss.

A hearing on damages for the default judgment was set for January 24, 1985, and a hearing on the Rule 11 sanctions was set for January 31, 1985. On the date set for a hearing on damages for the default judgment, Chem-Nuclear filed two motions opposing the court's entry of a default judgment. Chem-Nuclear argued that a default judgment was inappropriate because: 1) any attorney neglect was excusable; 2) it had stated meritorious defenses to plaintiff's claims; and 3) the facts had been misrepresented to obtain a default judgment.

Also on January 24, 1985, Garratt presented a lengthy written motion for recusal of Judge Gilmore. In the motion, Garratt questioned Judge Gilmore's impartiality, setting forth a history of Judge Gilmore's alleged "bias" in cases in which a party was represented by Garratt's firm.[1] The recusal motion was assigned to Honorable Robert E. DeMascio for disposition, and on February 21, 1985, Judge DeMascio denied the motion to recuse Judge Gilmore, stating:

> [i]nitially, we note that, under [28 U.S.C.] § 144, actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. Personal bias based upon extrajudicial actions must be shown. *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980).
>
> It is clear to this court that defendant is claiming no personal bias on the part of Judge Horace Gilmore. Defendant's allegations of bias all concern judicial actions taken by the presiding judge in the

---

[1]Garratt had sought the recusal of Judge Gilmore in three previous cases. Twice those motions were unsuccessful. In the third case, Judge Gilmore recused himself despite stating that he had no bias against Garratt. Judge Gilmore believed that an appearance of impropriety might arise because he had disqualified Garratt and his firm from representing a party in another case which was on appeal to the Sixth Circuit, *General Mills Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (1982).

> present and past cases in which defendant's counsel has appeared. This is an insufficient basis for disqualification.
>
> Additionally, we have reviewed the procedural history of this lawsuit. We are of the opinion that, in bringing this motion, defendant is compounding a demonstration of lack of good faith in the defense of this action. While we believe that this motion presents an appropriate basis for the imposition of sanctions under Fed. R. Civ. P. 11, such action is more appropriately left to the assigned judge.

On January 25, 1985, INVST filed a petition for payment of costs and attorney fees pursuant to Fed. R. Civ. P. 11.[2]

Garratt continued to file supplemental briefs and motions seeking reconsideration of the entry of default judgment until his law firm was replaced as counsel for Chem-Nuclear on April 3, 1985. Judge Gilmore refused to set aside the default judgment. On April 18, 1985, Judge Gilmore ruled that sanctions should be imposed personally upon Garratt for filing the motion to dismiss, the summary judgment motion, and the motion for recusal.

The district court then referred the matter to a magistrate, pursuant to Fed. R. Civ. P. 53, to determine the appropriate amount of fees or sanctions to assess against Garratt. The magistrate held two days of hearings at which Garratt's counsel actively participated. The magistrate recommended sanctions of $14,238.75, based upon the time spent by INVST's attorney in opposing Chem-Nuclear's motions to dismiss, for summary judgment, and for recusal of Judge Gilmore. Garratt contested the award, contending it was improper to award sanctions purely on the basis of actual time spent

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[2]Plaintiff sought fees for 196 hours, totaling over $18,000.00, from Chem-Nuclear, its attorney, or both. At the hearing on sanctions, plaintiff's attorney sought over $25,000 in fees and costs for 254 hours.

responding to the underlying motions, without establishing that the time expended was reasonable and necessary.

Over Garratt's objection, the district court adopted the report and recommendation of the magistrate and ordered Garratt to pay $14,167.50. A motion for reconsideration failed, and this appeal was filed.

On April 3, 1985, Chem-Nuclear's new counsel moved for reconsideration of the entry of default judgment, which motion was summarily denied. On April 18 and May 1, 1985, hearings were held to ascertain the amount of damages to be awarded INVST because of the default judgment. The court concluded that INVST had sustained $82,000 as damages on the claim for finder's fees and this appeal was filed.

II. DEFAULT JUDGMENT

Chem-Nuclear contends that the district court erred in refusing to set aside the default judgment despite defendant's meritorious defenses and the lack of any prejudice to plaintiff in the trial of such defenses.

The mechanism by which an entry of default judgment may be set aside is found in Fed. R. Civ. P. 55(c):

> [f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Fed. R. Civ. P. 60(b) provides grounds for setting aside a default judgment:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5)

> the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

This Court recently considered the standard of review in cases involving entry of default or entry of default judgments. In *Shepard Claims Service, Inc. v. William Darrah & Associates,* 796 F.2d 190, 193 (6th Cir. 1986), this court said:

> Rule 55(c) leaves to the discretion of the trial judge the decision whether to set aside an entry of default. However, a strong preference for trials on the merits in federal courts has led to the adoption of a somewhat modified standard of review where defaults are involved. In *United Coin* we wrote:
>
> > Trials on the merits are favored in federal courts and a "glaring abuse" of discretion is not required for reversal of a court's refusal to relieve a party of the harsh sanction of default.

705 F.2d at 846 (citing *Keegel,* 627 F.2d at 373-74).

In *Shepard Claims Service,* this court noted the distinction between the Rule 55(c) standard for default and the Rule 60(b) standard for default judgments announced in *Jackson v. Beech,* 636 F.2d 831, 835 (D.C. Cir. 1980): "[a] *default* can be set aside under Rule 55(c) for 'good cause shown,' but a default that has become final as a *judgment* can be set aside only under the stricter Rule 60(b) standards for setting aside final, appealable orders." Because this case involves a default judgment, we are bound by the stricter Rule 60(b) standards in determining whether to set aside the judgment.

In *United Coin Meter Co. v. Seaboard Coastal Line R.R.,* 705 F.2d 839 (6th Cir. 1983), this court described the three factors which determine the outcome of a motion to vacate

a default judgment: "[1] [w]hether the plaintiff will be prejudiced; [2] [w]hether the defendant has a meritorious defense; and [3] [w]hether culpable conduct of the defendant led to the default." *Id.* at 845. *See also Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136 (3d Cir. 1982). Because the court "should . . . construe[ ] all ambiguous or disputed facts in the light most favorable to the defendant[ ]," any doubt should be resolved in favor of the defendant. *Jackson*, 636 F.2d at 838.

In the instant appeal, review of the district court's denial of the motion to set aside the default judgment has been made difficult because the trial court failed to give any reason for refusing to set aside the judgment. Several courts have noted that a district court's failure to explain the standards used in refusing to vacate the default judgment is itself error requiring a remand. *See, e.g., Davis v. Musler*, 713 F.2d 907, 913 (2d Cir. 1983); *Farnese v. Bagnasco*, 687 F.2d 761, 765-66 (3d Cir. 1982); *see also Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980) (error not to indicate standard in order, but record provided sufficient basis for appellate review); *Medunic v. Lederer*, 533 F.2d 891, 893 (3d Cir. 1976) (error to fail to state standard but court of appeals able to make determination from record).

Initially, we must determine whether plaintiff will be prejudiced if the default judgment is vacated. At the hearing on the motion for default judgment, INVST claimed that it would suffer prejudice if forced to pursue the claim on the merits because defendant filed its answer only one month prior to discovery cutoff and only a few months prior to trial. Obviously, if the default judgment is set aside some delay will necessarily result because plaintiff would be entitled to discovery and preparation time. However, "delay alone is not a sufficient basis for establishing prejudice." *Davis*, 713 F.2d at 916; *see, e.g., United Coin*, 705 F.2d at 845; *Keegel*, 627 F.2d at 374. "Rather, it must be shown that delay will 'result

in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.' " *Davis,* 713 F.2d at 916; *quoting* 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2699 at 536-37 (1983).

Plaintiff has failed to establish that any prejudice from the delay would occur, because plaintiff has not shown that discovery would be more difficult or that evidence would be lost. *Cf. Quaker Valley School District v. Employers Mutual Liability Insurance Company of Wisconsin,* 96 F.R.D. 423, 424 (W.D. Penn. 1983) (financial costs and delay insufficient to establish prejudice). Accordingly, we hold that INVST has not shown prejudice within the meaning of the *United Coin* inquiry.

Next we must consider whether Chem-Nuclear has set forth a meritorious defense. The trial court did not consider the merits of the defenses raised in defendant's answer or motion for summary judgment, and we must therefore evaluate the merits of Chem-Nuclear's proposed defenses *de novo.*

"In determining whether a defaulted defendant has a meritorious defense '[l]ikelihood of success is not the measure' . . . . [r]ather, if *any* defense relied upon states a defense good at law, then a meritorious defense has been advanced." *United Coin,* 705 F.2d at 845, *quoting Keegel,* 627 F.2d at 374 (emphasis added). The *Keegel* court also added that such a defense is sufficient if it contains " 'even a hint of a suggestion' which, proven at trial, would constitute a complete defense." 627 F.2d at 374. The key consideration is "to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." 10 C. Wright, A. Miller, M. Kane, *supra,* § 2697 at 531.

Defendant submits two defenses which must be tested for adequacy under *United Coin, supra.* First, Chem-Nuclear contends that no acquisition ever took place to trigger the

finder's fee agreement. Second, Chem-Nuclear contests the method used by the court to calculate the commission or finder's fee. We note that there is no unambiguous formula for calculation of the commission in the terms of the agreement. Therefore, either of defendant's contentions, if proven, constitutes a defense to this action. Chem-Nuclear sufficiently sets forth adequate defenses for purposes of satisfying the meritorious defense inquiry of *United Coin*.

Finally, the culpability of defendant's conduct must be examined. In *Shepard Claims*, this court stated: "[t]o be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." 796 F.2d at 194. That panel declined to attempt a precise definition of "culpable conduct," but stated, "[w]here the party in default satisfies the first two requirements for relief and moves promptly to set aside the default before a judgment is entered, the district court should grant the motion if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings." *Id.*, 796 F.2d at 195. In this case, the district court found the sixteen month delay before filing an answer and defendant's failure to seek an extension of time under Fed. R. Civ. P. 6 "inexcusable." The district court did not, however, discuss the nature of defendant's conduct and did not characterize it as exhibiting disregard for the judicial proceeding. We must therefore review the record to decide whether the conduct of Chem-Nuclear's counsel was culpable and led to the default.

It was not the failure to file an answer which created discovery problems. Nor did the absence of a filed answer delay the status conference, at which no one mentioned the answer or the absence thereof. The delay in filing an answer did not affect the trial date. In fact, it appears that both parties acted as if the answer had been filed or was not needed.

Although Chem-Nuclear did not answer for sixteen months, by granting an indefinite extension of time INVST clearly acquiesced in the delay for some twelve months. Because the parties clearly had an agreement affording Garratt at least a twelve month extension and, arguably an unlimited extension of time in which to file an answer, the length of the delay is not as egregious as it appears.

The delay resulted, in part, from a misunderstanding of the terms of a letter purporting to revoke extensions of time. Because of discovery disputes during the first year of the litigation, INVST's attorney Reizen mailed a letter to Garratt on June 25, 1984, which said "from this point onward, I expect timely responses to all pleadings filed in this matter. . . ." Garratt later explained that he understood the letter, which was written in the context of a discovery dispute, to be a revocation of time extensions in discovery matters only and not as a revocation of the agreement indefinitely extending time to file an answer. Reizen contends, and the trial court found, that the letter was a revocation of all extensions of time.

Some three months after that letter, Garratt filed an answer for Chem-Nuclear, including a counterclaim and affirmative defenses. INVST promptly moved to strike the answer and Chem-Nuclear responded quickly to the motion to strike. At this point, when it became obvious that the parties were no longer operating under any agreements concerning extensions of time, Chem-Nuclear became prompt and prolific in filing motions and pleadings. It is significant, despite Reizen's contention that his June 25, 1984, letter to Garratt revoked all extensions of time, that Reizen took no action to seek a default until after Chem-Nuclear had answered. *See, e.g., Securities and Exchange Commission v. Vogel,* 49 F.R.D. 297, 300 (S.D.N.Y. 1969).

Because the purported revocation letter was written in the context of a discovery dispute, was ambiguous on its face, did not set any deadline for Chem-Nuclear to file an answer,

and because INVST took no action until after Chem-Nuclear's answer was filed, we conclude that the conduct of Chem-Nuclear's counsel, although careless and negligent, was not culpable within the meaning of the *United Coin* inquiry. We hold that Chem-Nuclear offered a credible explanation for the delay that did not exhibit disregard for the judicial proceedings.

This is not a case in which intransigence of the parties has made a default judgment appropriate. Instead, the procedural difficulties which led to the default judgment resulted from a misunderstanding between the attorneys involved. Default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court. *Shepard Claims Service*, 796 F.2d at 195.

> Although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention.

Id.

The presence of an agreement granting an extension of time to answer, the ambiguity of the attempted revocation of that extension, and a lack of action on the part of INVST after the purported revocation lead us to conclude that the default judgment against Chem-Nuclear was the result of excusable neglect on the part of Garratt. To prevent manifest injustice to Chem-Nuclear, the default judgment must be set aside so that the case may proceed on the merits.

We are not unsympathetic to the plight of the district court in this matter. The lawyers took it upon themselves to thwart the Federal Rules of Civil Procedure by seeking and granting extensions of time without court approval. Although Reizen generously granted an indefinite extension of time for

Chem-Nuclear to answer, Garratt abused that courtesy to such an extent that the rules became meaningless. Although counsel are encouraged to cooperate concerning waivers of procedural formalities,[3] the sloppy practice exhibited in this case is expressly disapproved. If extensions of time are to be granted to opposing counsel, those extensions should be short and specific. Counsel should reduce their agreed extension to writing and should file that agreement. Ideally, court approval of the extension should be obtained.

We do not address Chem-Nuclear's appeal of the refusal of the district court to grant summary judgment to Chem-Nuclear. The trial court expressly declined to consider the merits of Chem-Nuclear's motion for summary judgment, and this Court is not the appropriate forum to initially resolve such a motion. Upon remand, the district court will consider the merits of Chem-Nuclear's motion for summary judgment.

III. THE STANDARD FOR IMPOSING RULE 11 SANCTIONS

After Chem-Nuclear's answer was stricken for being filed untimely, Garratt filed a motion to dismiss, a motion for summary judgment, and a motion for recusal of the judge. INVST claimed it should be awarded attorney's fees and costs for having to defend against "harassing, frivolous, and unwarranted" motions which were filed only for the purposes of delay. Judge Gilmore agreed with INVST, imposing sanctions against Garratt personally for all three motions.

Federal Rule of Civil Procedure 11, as amended in 1983, provides:

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual

[3]Model Code of Professional Responsibility, EC 7-38, (1980).

> name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The 1983 amendment to Rule 11 removed much of the district court's discretion in imposing sanctions; Rule 11 now mandates the imposition of sanctions if the underlying conduct is found to violate the Rule. The standard by which conduct is judged has become more stringent as well; a showing of "good faith" will no longer be sufficient to avoid sanctions.

The conduct of counsel that is the subject of sanctions will be measured by an objective standard of reasonableness under the circumstances. *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986). *See also Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir. 1985); *Davis v. Veslan Enterprises*, 765 F.2d 494, 497 (5th Cir. 1985); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

Thus, we must determine whether Garratt's actions were reasonable under the circumstances. Although a district court is given wide discretion in deciding whether counsel have acted reasonably under the circumstances, "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment. *See also Eavenson,* 775 F.2d at 540-41.

If a district court concludes that Rule 11 has been violated, the court has no discretion and must impose sanctions. However, in deciding the nature and extent of sanctions to impose, the district court is given wide discretion. *See, e.g., Albright,* 788 F.2d at 1221-22; *Westmoreland,* 770 F.2d at 1174; *Veslan,* 765 F.2d at 498, 501; *see also* Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment.

Garratt contends that the district court abused its discretion in imposing sanctions, abused its discretion in the amount of sanctions imposed, and violated Garratt's due process rights in the imposition of sanctions.

Although the district court did not set forth in writing the basis for imposing Rule 11 sanctions personally upon Garratt, the record contains an oral statement of those reasons.[4] We must determine whether the trial court abused its discretion in determining that Garratt's conduct was not reasonable under the circumstances.

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[4]Rule 11 does not require written findings of fact and conclusions of law but the presence of such a statement in the record facilitates appellate review. *Albright,* 788 F.2d at 1221-22 (sanctions imposed despite absence of written findings of fact). *But see Albright,* 788 F.2d at 1222 (Guy, J., dissenting) (presence of findings of fact would require analysis under "clearly erroneous" standard).

IV. MOTION FOR DISQUALIFICATION OF JUDGE

Garratt and his law firm entered an appearance for Chem-Nuclear in August. Garratt appeared before Judge Gilmore at a status conference in November 1983, and at a hearing in November 1984. However, Garratt and his firm did not move for Judge Gilmore's recusal until the January 1985 hearing on plaintiff's default judgment motion and defendant's motions to dismiss and for summary judgment. At that hearing, a member of Garratt's firm made an oral motion for recusal, without providing supporting documentation to show any alleged bias on the part of Judge Gilmore. In fact, a written recusal motion was not filed until the day of the hearing on the amount of damages to be awarded on the default judgment.

The damages hearing was delayed to permit Judge DeMascio to rule on the recusal motion. Judge DeMascio denied the motion for recusal, reasoning that Garratt's claims of bias involved only judicial actions in prior litigation, which Garratt perceived as being unfavorable to his firm. Because recusal is appropriate only where bias based on extrajudicial actions is shown, Judge DeMascio ruled that the motion was without merit[5] and recommended that Rule 11 sanctions be imposed for filing the motion for recusal.

Garratt's motion for recusal of Judge Gilmore violates all three sanctionable circumstances of Rule 11. The motion was not well-grounded in fact, was not warranted by existing law or a good faith argument for the extension of existing law, and was filed for the improper purpose of delaying the default judgment hearing.

Prior to Judge DeMascio's denial of Garratt's motion to recuse Judge Gilmore, Judges Guy and Churchill, fellow district judges of the Eastern District of Michigan at the time,

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[5]Judge DeMascio relied upon *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980).

had dismissed similar motions filed by Garratt to recuse Judge Gilmore. The basis for each motion was identical, and both times the motion failed. In filing the motion for recusal in the instant case, Garratt advanced no new fact or legal argument to support a different result.

Further, there was absolutely no legal basis upon which Garratt could have reasonably believed that adverse rulings in prior cases were sufficient to show bias. This court, in *Southerland v. Irons*, 628 F.2d 978, 980 (1980), explicitly held that "actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification . . ."

Garratt, however, contends that the facts of this case are an exception to the general rule requiring proof of extrajudicial bias because the comments of the judge during the proceedings were indicative of actual personal bias. Garratt contends that the conduct of Judge Gilmore exceeded the conduct found to be grounds for recusal in *Nicodemus v. Chrylser Corp.*, 596 F.2d 152 (6th Cir. 1979) and *United States v. Ritter*, 540 F.2d 459 (10th Cir.) *cert. denied*, 429 U.S. 951 (1976). However, the conduct of the district judge in *Nicodemus* which justified recusal was in the form of comments made by the judge before hearing the merits of the case, which comments displayed prejudice against a party. In *Ritter*, the court ordered recusal because it was reasonable to question the impartiality of the recused judge due to comments that he had made during motion hearings.

Neither *Nicodemus* nor *Ritter* are similar to the instant case. Garratt only complains that Judge Gilmore granted a motion to strike Chem-Nuclear's answer, granted plaintiff's motion for default judgment, denied defendant's motions to dismiss and for summary judgment, and described as "outrageous" certain of Garratt's legal arguments. The actions and comments of Judge Gilmore were a result of, and in response to, legally inconsistent or questionable arguments on the merits of the case. Judge Gilmore's comments do not

in any sense indicate personal bias against Garratt or Chem-Nuclear. In fact, the comments of Judge Gilmore, when viewed in context, represent an understandable response to pending motions, some of which were patently without merit.

We conclude that Garratt violated Rule 11 by filing the motion for recusal. Accordingly, the imposition of sanctions on Garratt for filing the motion for recusal is affirmed.

V. THE MOTION TO DISMISS

After defendant's untimely answer was stricken, Garratt filed on behalf of Chem-Nuclear a motion to dismiss plaintiff's complaint for failing to serve process on a "viable" party. In imposing sanctions, Judge Gilmore described the motion as "outrageous" because Garratt was belatedly arguing that Chem-Nuclear did not exist, after having filed an answer and counterclaim which did not raise this Fed. R. Civ. P. 12(b)(5) defense. The motion to dismiss for insufficiency of service of process had clearly been waived and was expressly prohibited as untimely by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(h)(1). Because even a cursory review of Rule 12 would have revealed that the defense lacked any foundation in law, Garratt was properly sanctioned for the motion to dismiss for insufficiency of service of process.

VI. MOTION FOR SUMMARY JUDGMENT

After the answer had been stricken, but before entry of default judgment, Garratt filed a motion for summary judgment contending that INVST was not entitled to a finder's fee. Garratt argued that no acquisition which would trigger payment of the fee had occurred; therefore, Chem-Nuclear owed nothing to INVST. The court denied the motion for summary judgment, reasoning "[i]t certainly does not make any sense to entertain a motion for summary judgment on the merits when I have prevented the defendant from filing an answer."

At the time Garratt filed the motion for summary judgment, Chem-Nuclear's answer had been stricken and the district court had advised plaintiff to take steps to protect its interest, but no default judgment had been entered. The defendant's motion for summary judgment, therefore, was a defensive measure anticipating plaintiff's motion for default judgment. The motion for summary judgment violated no rule of procedure and was filed before the motion cut-off date set by the court. Additionally, at the very least, it raised potentially meritorious defenses. Therefore, the summary judgment motion was not frivolous and does not constitute sanctionable conduct. No cases have been cited by INVST, and none have been found by this court, which stand for the proposition that the striking of an answer forecloses the right to file a motion for summary judgment. In fact, such a proposition would be illogical. In 1946, Fed. R. Civ. P. 56(a) was amended to allow a party to move for summary judgment "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party." The advisory committee on rules noted that the amendment changed the earlier rule, which prevented a *claimant* from moving for summary judgment until a formal answer had been filed [apparently, even under the former rule a defendant was not precluded from moving for summary judgment until an answer was filed.] *But see Johnston-Crews Co. v. United States*, 38 F. Supp. 544 (D.S.C. 1941); *Hooven, Owens, Rentscher Co. v. Royal Indemnity Co.*, 1 F.R.D. 526 (D. Ohio 1940)]. Fed. R. Civ. P. 56(a) advisory committee note (a) to the 1946 amendment. At any rate, the phrase "at any time" has since been given a literal construction. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), the Supreme Court affirmed summary judgment in favor of a defendant who had not filed an answer, even though the litigation was six years old when defendant filed the motion for summary judgment. The Court found it significant that defendant had participated in discovery, and plaintiff had

acquiesced in the delay and had entered into stipulations contributing to the delay. *Cities Service,* 391 U.S. at 291-92. Courts and commentators have acknowledged that no answer need be filed before a defendant's motion for summary judgment may be entertained. *See Southern Pacific Transportation Co. v. National Molasses Co.,* 540 F.2d 213, 214 (5th Cir. 1976) (court allowed summary judgment motion before answer filed; however, motion treated as Fed. R. Civ. P. 12(b)(6) motion because not accompanied by affidavits); *Hubicki v. ACF Industries, Inc.,* 484 F.2d 519, 522 (3d Cir. 1973) (summary judgment motion may be made before pleading to the complaint); *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.,* 587 F.Supp. 1446, 1456 (D. N.J. 1984) (court noted that 1946 amendment to Rule 56(a) changed prior rule requiring answer before Rule 56 motion could be made); 10 C. Wright, A. Miller, M. Kane § 2718 at 668 (1983) ("Defendant is not required by the rule to file an answer before moving for summary judgment.")

It is clear that no answer need be filed before a defendant may move for summary judgment. It follows that having an answer stricken poses no impediment to moving for summary judgment; the effect of striking an answer is to posture the action as if no answer had ever been made. This was the status of the present action when Garratt moved for summary judgment; the answer had been stricken and default judgment had not been entered against Garratt's client. Therefore, it was not sanctionable conduct, merely because the answer had been stricken, for Garratt to file the motion for summary judgment.

VII. REASONABLENESS OF THE SANCTIONS

Garratt contends that the sanctions imposed upon him are unreasonable and excessive. Because we have reversed the imposition of sanctions for filing the summary judgment motion, and because the total amount of sanctions imposed for all three motions is not broken down into its component

parts, a remand for calculation of the amount of sanctions is required.

In determining the amount to award as "reasonable expenses," a court must consider the goals of Rule 11 which are the deterrence and punishment of offenders and the compensation of their opponents for expenditure of time and resources responding to unreasonable pleadings or motions. *See, e.g., Westmoreland,* 770 F.2d at 1179-80; *see generally* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look,* 104 F.R.D. 181, 201 (1985). "Reasonable" does not necessarily mean actual expenses. *See, e.g., In re TCI, Ltd.,* 769 F.2d 441, 448-49 (7th Cir. 1985); *Local No. 115,* 106 F.R.D. at 349; *see generally* Schwarzer, *supra,* 104 F.R.D. at 203. Thus, in order to award the fees sought by plaintiff's counsel in this case, the court must find that the actions for which fees are sought were reasonably necessary to defend against the motions. A reasonableness inquiry necessarily requires a determination as to what extent plaintiff's expenses and fees could have been avoided and were self-imposed. When counsel is called upon to defend against its adversary's unreasonable motion practices, he must mitigate damages by correlating his response, in terms of hours and funds expended, to the merit of the claims[6]. The mitigation requirement prevents a party from misusing Rule 11 sanctions in order to benefit from the errors of opposing counsel. *See* Schwarzer, *supra,* 104 F.R.D. at 201; *see also In re TCI,* 769 F.2d at 448-49; *Local No. 115,* 106 F.R.D. at 349-50. The district court is therefore required to balance carefully these competing interests in determining the amount of sanctions.

The record is unclear whether the magistrate considered

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[6]INVST described Chem-Nuclear's motion to dismiss as "so frivolous and vexatious that it hardly deserves to be dignified by a response." We cannot ascertain from the record how much of the claimed fees and expenses are attributable to this motion which "hardly" deserves a response.

the mitigation factor in calculating the sanctions. It appears that the magistrate's focus was upon whether INVST's counsel actually expended the hours he claimed to have worked in responding to the three motions rather than upon whether the hours spent were reasonably necessary. Because we are unable to determine the actual basis for the sanctions imposed, and because we have reversed the award of sanctions stemming from the motion for summary judgment, upon remand the magistrate or district court should state the basis for the amount of sanctions awarded, including whether the hours were actually spent *and* were reasonably necessary. Such an analysis, focusing upon the necessity for the actual time spent, reduces the possibility that Rule 11 can be abused by a fee petitioner.

VIII. DUE PROCESS CONSIDERATIONS

Garratt contends that the hearing held on the Rule 11 sanctions did not provide him due process. This contention is without merit. Garratt and Chem-Nuclear were given notice of the imposition of sanctions and an opportunity to explain the conduct for which the sanctions were imposed. The hearing was held before a magistrate acting as special master in calculating the amount of sanctions. At the hearing, Garratt's counsel fully cross-examined plaintiff's attorneys about the hours spent and fees charged. Garratt also submitted to the magistrate numerous documents setting forth his position which were also filed with the district court. Therefore, Garratt was afforded notice and opportunity for a hearing, as required by due process.

Furthermore, although the assessment of sanctions under Rule 11 must comport with due process, the procedure employed to assure due process will "depend on the circumstances of the situation and the severity of the sanction under consideration." Fed. R. Civ. P. 11, advisory committee note to the 1983 amendment. *Accord Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985). In

Rodgers, the Seventh Circuit Court of Appeals upheld an award of sanctions even though no formal hearing on sanctions was held. According to the *Rodgers* court, no hearing was necessary where the district court which had imposed the sanctions had participated in the proceedings, and where the sanctions were not based on bad faith "but on counsel's incompetence in handling [the] matter by making 'frivolous' and 'worthless' claims 'without first making a proper inquiry into the relevant law and facts.' " *Rodgers*, 771 F.2d at 206.

In the present case, Garratt received more extensive due process protection than Rule 11 and the courts require. As the *Rodgers* case illustrates, no hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact, and where the judge imposing sanctions has participated in the proceedings. These are the circumstances in Garratt's case; nevertheless, he was afforded a full-blown hearing complete with confrontation privileges and an opportunity to present arguments and supporting documentation. Therefore, Garratt enjoyed more than minimum due process protection. *See generally Rodgers*, 771 F.2d at 206; *LePucki v. Van Wormer*, 765 F.2d 86, 88 (7th Cir.) (attorney did not have explicit notice, but due process satisfied if he knew the court was considering imposition of sanctions), *cert. denied*, 106 S. Ct. 86 (1985); *Eastway Construction Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986) (attorney must be allowed to present mitigating factors); *In re ITEL Securities Litigation*, 596 F. Supp. 226, 232 n.7 (N.D. Calif. 1984) (sufficient that accused is allowed to address the court with respect to allegations); *Adduono v. World Hockey Association*, 109 F.R.D. 375, 380 (D. Minn. 1986) (sufficient if counsel is allowed opportunity before the court to oppose sanctions).

IX. CONCLUSION

In INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., the judgment of the district court is REVERSED and

the case is remanded with directions to set aside the default judgment, to reinstate defendant's answer, and for further proceedings. No costs are allowed; each party will pay its costs on appeal.

In In re Garratt and Garratt & Morris, P.C., the judgment of the district court imposing sanctions for the motion to dismiss and motion for recusal is AFFIRMED. The judgment of the district court imposing sanctions for the motion for summary judgment is REVERSED. The case is remanded for a recalculation of fees and expenses awarded as sanctions and for further proceedings not inconsistent with this opinion.

United States Court of Appeals

For the Sixth Circuit

85-1731
No. 85-1888

INVST FINANCIAL GROUP, INC. ,
Plaintiff-Appellee,

v,

CHEM -NUCLEAR SYSTEMS, INC.,
Defendant-Appellant (85-1731).

IN RE: C. WILLIAM GARRATT, and GARRATT & MORRIS, P.C.
Petitioners-Appellants
(85-1888).

Before: KEITH and WELLFORD, Circuit Judges; and TODD, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in case 85-1731 be and the same is hereby reversed and the case is remanded consistent with this opinion. It is further ordered and adjudged by this court that the judgment

of the said district court in case 85-1888 is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

No costs taxed.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk

By_____
Deputy Clerk

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate:
June 18, 1987
COSTS: None
Filing fee . . . . . $
Printing . . . . . $
Total . . . . . $

A True Copy.

Attest:

_____
Deputy Clerk

FILED
MAR 31, 1987
JOHN P. HEHMAN, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION**

INVST FINANCIAL GROUP, INC.,
a Michigan Corporation,
Plaintiff-Appellee,

-vs- Nos. 85-1731/1888

CHEM-NUCLEAR SYSTEMS, INC., a
Washington Corporation.
Defendant-Appellant. (85-1731)

IN RE: C. WILLIAM GARRATT, and
GARRATT & MORRIS, P.C.,
Petitioners-Appellants (85-1888)

PETITIONERS-APPELLANTS' MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE PETITION FOR REHEARING

NOW COMES Petitioners-Appellants C. William Garratt and Garratt & Morris, P.C., by counsel, and in support of their Motion for Enlargement Of Time In Which To File Petition For Rehearing state as follows:

1. On March 31, 1987, this Court decided and filed the above captioned appeals.

2. Petitioners-Appellants believe that this Court has overlooked or misapprehended certain points of law and fact with respect to the imposition of Rule 11 sanctions for the filing by Petitioners-Appellants of a motion for disqualification of the trial judge. Accordingly, Petitioner-Appellants seek a rehearing of that issue.

FILED
APR 17 1987
JOHN P. HEHMAN, Clerk

MOTION GRANTED
ENTERED BY THE CLERK PURSUANT
TO RULE (8B) SIXTH CIR. RULES

/s/ John P. Hehman, Clerk

CLERK

CM-4/23

NOS. 85-1731/1888
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INVST FINANCIAL GROUP, INC.,
Plaintiff-Appellee

vs. (85-1731)

CHEM-NUCLEAR SYSTEMS, INC.,
Defendant-Appellant

IN RE: **ORDER**

C. WILLIAM GARRATT, ET AL.,
Petitioners-Appellants

INVST FINANCIAL GROUP, INC., (85-1888)
Plaintiff-Appellee

vs.

CHEM-NUCLEAR SYSTEMS, INC.,
Defendant

BEFORE: KEITH and WELLFORD, Circuit Judges; TODD, District Judge*

This matter is before the court upon consideration of the appellants' petition for rehearing on this court's order of March 31, 1987, which reversed and remanded as to 85-1731 and affirmed in part, reversed in part and remanded as to 85-1888.

After careful consideration of the petition, the court concludes that is misapprehended no questions of law or fact in its order of March 31, 1987.

Therefore it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

BEST AVAILABLE COPY

E-1

News Editorial (8/29/87)

The Detroit News
615 Lafayette Boulevard, Detroit, Mich. 48231
A Gannett Newspaper

Published Mornings, Evenings and Sunday

Editorials

Racing Pigs, Sex Offenders, etc.

■ **LAWYERS HEAL THYSELVES:** After years of leniency, lawyers are being slapped with court fines for frivolous cases and offensive tactics, reprimanded and disbarred in record numbers and sued by clients for losing cases or for not winning big enough victories. So they are shying away from practicing innovative courtroom tactics and inventing new legal theories. It seems lawyers, who created the litigation explosion that begat this latest crackdown, have brought judicial restraint upon themselves.

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The Detroit News 75¢

pass in Sat-
la, setting up
against Ohio
ry/1C

Bribe charges detailed

Judge Bronson asked $40,000 in Ford liability ruling, sources say

By Norman Sinclair and Joanna Firestone
News Staff Writers

Appeals Court Judge S. Jerome Bronson shot himself to death after he was confronted Friday with recorded evidence that he solicited a $40,000 bribe in exchange for a promise to act favorably on the appeal of a multimillion dollar liability case.

Sources close to the investigation Saturday confirmed this scenario: Bronson, 56, passed a message through former Wayne County Circuit Court Chief Judge James N. Canham to Detroit attorney James Finn. The message said that Bronson could help sustain a $3.25 million judgment against Ford Motor Co. in return for $20,000 up front and an additional $20,000 when the decision was finalized.

Finn, who represented the liability plaintiff, reportedly was outraged at the suggestion. He informed Appeals Court officials, who called in the attorney general's office and subsequently, the state police.

CONFRONTED BY police, Canham agreed to assist in the investigation in exchange for immunity from prosecution, sources said. They said Canham gave Bronson $20,000, which was put up by the state and later recovered in a search. They said Canham was wearing a hidden microphone and the transaction was recorded by police.

State law enforcement officials refused to elaborate on the case. Atty. Gen. Frank J. Kelley was reported to be in California. A spokesman for him said Kelley would not comment until he talked with Chief Appeals Judge Robert J. Danhof.

Neither Canham nor Finn could be reached for comment late Saturday. Repeated calls to Canham's home in Redford Township were unreturned. A call to Finn's Detroit office was not returned and his home telephone number is unlisted.

The case being appealed involves Michael Harrigan, now 32, of Louisville, Ky. He became a quadriplegic after his Ford-built truck plunged down a Kentucky mountain in a July 1980 accident.

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F-1

Bronson News Article (11/16/87)

EDWIN C. LOMBARDO/The Detroit News

ıootings of two fellow students Thursday.

He was reported in serious condition at Receiving with a facial wound. "It's lodged somewhere in his head," said hospital spokesman Dennis Archambault.

Please see **School/4A**

DON JETTE · The Detroit News

Church sign
/eek.

FBI's judicial probe goes public

Court employees questioned; indictments expected soon

By Norman Sinclair
News Staff Writer

The FBI went public Thursday with its long-rumored investigation of Detroit's judiciary when it took the unusual step of sending a large number of agents into 36th District and Recorder's courts to conduct interviews.

No arrests were made, but officials close to the judicial corruption investigation said a federal grand jury soon will indict judges from the two courts.

"The FBI today (Thursday) entered into the overt stage of an investigation concerning allegations of public corruption involving various components of the Detroit criminal justice system," Joseph Jackson, an FBI spokesman, said in a written statement.

He said the FBI was acknowledging the 3-year-old investigation because Thursday's interviews prompted wideapread inquiries.

THE BUREAU'S public display of investigative muscle quickly drew criticism from judges and others.

"They said they wanted to be discreet, and yet they came in at the busiest time that this court experiences," said Recorder's Chief Judge Dalton A. Roberson. "Everybody knew who they were."

Detroit Mayor Coleman A. Young reacted with more anger.

"Did they have to go to the Recorder's Court and District Court during the busiest time of the day? Did they want information, or were they seeking publicity?" Young said. "They literally invaded like a plague of locusta."

Inhia

THE 49TH ANNUAL
LODGE BANQUET

36th District News Article (4/17/87)

Supreme Court, U.S.
FILED
OCT 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-423

In The

Supreme Court of the United States

October Term, 1987

C. WILLIAM GARRATT and
GARRATT & MORRIS, P.C.,

Petitioners,

vs.

INVST FINANCIAL GROUP, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S IMPOSITION OF SANCTIONS UPON PETITIONER UNDER FED.R. CIV.P. 11 FOR FILING AN UNTIMELY AND LEGALLY INSUFFICIENT MOTION TO RECUSE THE PRESIDING DISTRICT COURT JUDGE FOR ALLEGED BIAS OR PREJUDICE DIRECTED AT PETITIONER AS COUNSEL FOR A PARTY DURING THE COURSE OF JUDICIAL PROCEEDINGS?

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No. 87-423

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In The

Supreme Court of the United States

October Term, 1987

—o—

C. WILLIAM GARRATT and
GARRATT & MORRIS, P.C.,

Petitioners,

vs.

INVST FINANCIAL GROUP, INC.,

Respondent.[1]

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

[1] The underlying action out of which this Petition grew was filed by Respondent as Plaintiff in the United States District Court for the Eastern District of Michigan. *INVST FINANCIAL GROUP, INC., a Michigan Corporation, Plaintiff v CHEM-NUCLEAR SYSTEMS, INC., a Washington Corporation, Defendant,* No. 83-CV-2217-DT. Ultimately, a Default Judgment was entered against the Defendant, Chem-Nuclear Systems, Inc. and sanctions were imposed pursuant to Fed.R.Civ.P. 11 personally

(Continued on following page)

STATUTORY PROVISIONS AND COURT RULES INVOLVED

Fed.R.Civ.P. 11 is set forth as Appendix a.

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STATEMENT OF THE CASE

Petitioner's Statement Of The Case omits several key points relating to this Petition, and therefore Respondent must present its own statement of the case.

Chem-Nuclear Systems, Inc., a subsidiary of a multinational waste disposal firm, Waste Management Corporation, agreed to pay Respondent, Invst Financial Group Inc., ("Invst") a finder's fee for introducing Chem-

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(Continued from previous page)

upon the Petitioner, C. William Garratt, as trial counsel for Chem-Nuclear. Chem-Nuclear Systems, Inc. took an appeal from the Default Judgment to the United States Court of Appeals for the Sixth Circuit, Appeal No. 85-1731. Petitioner, C. William Garratt filed two (2) appeals with respect to the District Court's rulings, the first of which, No. 85-1732, was dismissed on December 9, 1985 for untimeliness and Garratt's lack of standing to challenge the merits of Orders denying his Motions to disqualify the Hon. Horace W. Gilmore as presiding Judge over the District Court action. His second Notice of Appeal, Appeal No. 85-1888, sought review of the final Order imposing monetary sanctions upon him and was captioned in the Sixth Circuit as *In Re: C. WILLIAM GARRATT and GARRATT & MORRIS, P.C.* That appeal was argued before the Sixth Circuit at the same time as Chem-Nuclear's No. 85-1731 but a Sixth Circuit interim Order refrained from consolidating the appeals. Nevertheless, in its Opinion the Sixth Circuit treated the two matters as "a consolidation of two cases which arose out of a common set of facts". 815 F.2d 391, 394; A-2.

Pursuant to S.Ct.R. 28.1, Respondent declares it has no parent, subsidiary or affiliate corporations.

Nuclear to corporate merger or acquisition candidates. After Invst introduced Chem-Nuclear to a company called Hanchar Industrial Waste Management, Inc., a dispute arose over whether a finder's fee was owing Invst. The underlying suit was then initiated by Invst against Chem-Nuclear on June 3, 1983 in the District Court to recover the fee.

Proceedings In The District Court

Sometime after receipt of the suit papers, counsel for Chem-Nuclear, the Petitioner, C. WILLIAM GARRATT ("Garratt"), on or about August 10, 1983 phoned counsel for Respondent, Mark E. Reizen, requesting an extension of time to answer. As a professional courtesy, Reizen agreed to an extension for a reasonable but unspecified amount of time to answer only, thus indicating that under no circumstances would the extension be afforded to file motions or counterclaims. When Garratt's answer was not soon forthcoming, Reizen wrote to him on four (4) separate occasions—September 7, 1983, December 1, 1983, February 3, 1984 and June 25, 1984—requesting a status report, some action or response. Garratt never responded to these written inquiries. Phone calls proved similarly unavailing. Although Reizen attempted to conduct discovery in the case, those efforts were completely frustrated by Garratt's delaying and stalling tactics.[2]

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[2] A Federal Magistrate entered three (3) separate Orders compelling Chem-Nuclear to file meaningful responses to Respondent's initial set of Interrogatories, and two (2) of those Orders impose monetary sanctions for dilatory tactics. Garratt effectively, therefore, never provided any meaningful discovery while the case was pending in the District Court and further failed to file a witness list by September 15, 1983, as required by the District Court's Pre-Trial Order.

Finally, on June 25, 1984, Reizen revoked all extensions of time with respect to all aspects of the case. He stated,

> Discovery in this matter on behalf of your client has been dilatory at best, and it appears that I will no longer be able to accommodate you with requests for extensions of time with regard to any matter on this file. From this point onward, I expect timely responses to all pleadings filed in this matter and I will not hesitate to seek the Court's protection from this point onward.

(The Trial Judge read this letter into the record on November 15, 1984, Tr. 8-9).

Having gained tactical advantage through obfuscation and delaying tactics, Garratt thereafter, on October 3, 1984, filed an answer *with counterclaims* on the eve of trial (set for January, 1985) and some three (3) weeks before discovery cut-off (November 1, 1984). Respondent promptly moved to strike these pleadings because no Order of extension had been presented or entered which would permit Chem-Nuclear to plead *sixteen (16) months* after service, and because counsel for Respondent had long since (some three (3) months earlier) explicitly revoked any extensions of time earlier provided as professional courtesies to Garratt.

The District Court, the Honorable Horace A. Gilmore, heard the Motion to Strike on November 15, 1984 and explicitly determined that there was no excuse for the failure of Garratt to file a responsive pleading for over sixteen (16) months or to seek an out of time enlargement to plead pursuant to Fed.R.Civ.P. 6(b)(2). In the terms of that Rule, the District Court determined that there was "no excusable neglect" for Garratt's conduct. Moreover,

the District Court further found that counsel for Respondent had, at least as of the date of the June 25, 1984 letter, clearly terminated any consent to further extensions of time for Chem-Nuclear to plead. Finally, Judge Gilmore citing this Court's decision in *Link v. Wabash RR.*, 370 U.S. 626 (1962), rejected Garratt's suggestion that his professional negligence should not be imputed to his client, Chem-Nuclear. In view of this, the District Court struck the tardy answer and counterclaims and subsequently entered Default on January 17, 1985.

Thereafter, Garratt greatly multiplied the proceedings and ultimately was sanctioned for his conduct in that regard. Due to a death in the District Judge's family, an Order striking the pleadings pursuant to the November 15th ruling was not entered until November 30, 1984. This interlude gave Garratt an opportunity to file a Motion to Dismiss for Insufficiency of Service Process and a Motion for Summary Judgment and/or Judgment on the Pleadings.[3] Respondent, Invst moved the District Court for entry of default and default judgment on December 5, 1984 and opposed Garratt's Motions to Dismiss and for Summary Judgment contending they were frivolous. Invst's Motion for Default and Default Judgment and Garratt's Motion to Dismiss and for Summary Judgment were set down for hearing for January 17, 1985.

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[3] In all likelihood, these papers could never have been filed with the District Court Clerk if the Order striking the pleading had been promptly issued in due course since Chem-Nuclear would have been effectively in a state of default. Further, Invst was prohibited from obtaining a clerk's entry of default because the clerk found Garratt's stricken answer and later his Motion to Dismiss extant in the Court's file.

Before argument began on the pending Motions that were called on January 17, 1985, Garratt's partner, without any supportive papers or affidavits and without any prior notice to opposing counsel or the Court, announced that he was orally moving for recusal of Judge Gilmore and was doing so because a "respected attorney" in the Detroit area had wanted to make the Motion but was indisposed. The Court summarily denied that Motion for Recusal because it was orally made and unaccompanied by an affidavit as required by statute, 28 U.S.C. § 144.

The District Court then turned its attention to the pending Motions and heard argument on the same. With respect to Garratt's Motion to Dismiss for alleged insufficiency of service of process brought under Fed.R.Civ.P. 12(b)(5), the District Court characterized it as "outrageous". Garratt had already filed an answer and counterclaims on behalf of Chem-Nuclear which had not raised any such defenses. Only after those pleadings were stricken, did Garratt attempt to argue that Chem-Nuclear had merged into a wholly owned subsidiary of its parent company, no longer existed and therefore was incapable of receiving service of process. The District Court stated that it did not understand how an officer of the Court could say two things so completely contrary within the space of six (6) weeks. Relying on the express provisions of Fed. R.Civ.P. 12(h)(1), the District Court determined that the claim of insufficiency of service of process had not been raised in a timely manner, clearly had been waived and further concluded that the argument had not been made in good faith and was "outrageous".

With respect to Garratt's Motion for Summary Judgment, much of it reiterated the contentions made in the

Motion to Dismiss. The District Court rejected the remainder of the arguments concerning that motion because Chem-Nuclear's answer had been stricken. It reasoned that Chem-Nuclear was precluded from defending in summary proceedings because its procedural default prohibited it from contesting the merits of liability at trial.

The District Court also determined that Rule 11 sanctions were warranted, characterizing Garratt's Motion to Dismiss "outrageous" in the face of the explicit waiver provisions of Rule 12(h)(1). The District Court also deemed that the Motion for Summary Judgment was sanctionable, reasoning that if a party was foreclosed from contesting the merits of an action in view of a procedural default, it follows, *a fortiori*, that party will necessarily be foreclosed from contesting the merits of the case via the summary judgment device.[4] A hearing on the Default Judgment was adjourned for one (1) week, *i.e.*, until January 24, 1985, and the Court determined it would conduct a hearing on a Petition for Rule 11 sanctions in two (2) weeks, *i.e.*, January 31, 1985.

When the case was called on for the Default Judgment hearing on January 24, 1985, Garratt's partner, again without prior notice to counsel or the Court, sought to address the recusal of Judge Gilmore from presiding over the case for a second time. This time, Garratt filed a

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[4] *See Thomson v. Wooster*, 114 U.S. 104, 114 (1885) (default absolutely bars and precludes defendant from alleging anything in derogation of, or in opposition to plaintiff's claims); *Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 186 (7th Cir. 1982) (court refuses to consider motion for directed verdict at close of default judgment damages hearing because, *inter alia*, such would reopen the question of liability foreclosed by entry of default).

lengthy written application accompanied by two (2) affidavits: one of Garratt as counsel for Chem-Nuclear, and another signed by various attorneys in his office. Garratt's affidavit merely alleged, in conclusory terms, that Judge Gilmore had made erroneous rulings against him and the attorneys in his law firm in this and other actions. Garratt also disclaimed that he had acted in bad faith or had violated Rule 11. The second affidavit, again in conclusory fashion, communicated the subjective belief of the attorneys in Garratt's firm that Judge Gilmore was biased and prejudiced against Garratt.[5] No affidavit of a "party", *i.e.*, of any representative or officer of Chem-Nuclear, was presented with the application.

Judge Gilmore immediately referred the matter pursuant to 28 U.S.C. § 144 to another Judge, the Honorable Robert DeMascio, who was chosen by a blind draw system to hear the matter. Judge DeMascio expeditiously dealt

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[5] Incredibly, Garratt also attempted thereafter to supplement the application for recusal by presenting a wholly frivolous affidavit of a licensed polygraph examiner who stated that it was her professional opinion that the lawyers in Garratt's firm believed that Judge Gilmore was biased against Garratt and his firm. Carratt also attempted to support his argument for disqualification of Judge Gilmore by attaching applications for recusal of Judge Gilmore he had filed in three (3) previous cases. However, as pointed out by Respondent in its papers opposing the application, Garratt completely failed to advise in his application that District Judges Ralph Guy and James P. Churchill ultimately denied Garratt's Motions to Disqualify in two (2) of the cases to which he made reference. In the third, Judge Gilmore voluntarily recused himself stating that he had no bias against Garratt, but believed an appearance of impropriety might arise because he had disqualified Garratt and his firm from representing a party due to their involvement as witnesses in another case which was on appeal. *See* 815 F.2d 391, 396 n.1; A-6 n.1.

with Garratt's Motion for Disqualification finding it clearly unmeritorious under controlling precedent. (His February 21, 1985 Order is included herein as Appendix b). Judge DeMascio determined that all the allegations of bias against Garratt concerned judicial actions taken by Judge Gilmore in the present and past cases—actions which were legally insufficient to require disqualification under *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980). Judge DeMascio also determined that the Motion represented yet another demonstration of a lack of good faith in defending the action warranting Rule 11 sanctions, the imposition of which was more properly left to Judge Gilmore.

Subsequent to Judge DeMascio's denial of the Motion for Disqualification, the Court and the parties again turned to the matter of sanctions. Garratt continued to file voluminous supplemental briefs and motions until his client Chem-Nuclear retained new counsel on April 3, 1985. On April 18, 1985, Judge Gilmore conducted a hearing with respect to sanctions wherein Chem-Nuclear was represented by new counsel and Garratt was represented by counsel of his choice. Garratt and his counsel were given every opportunity to present any matters with respect to sanctions at that hearing. After Garratt's counsel had made a presentation, and after argument had been heard from all counsel involved, Judge Gilmore determined that sanctions should be imposed personally upon Garratt for filing the Motions to Dismiss, for Summary Judgment and for Disqualification. The matter of amount of the sanctions to be imposed was referred to a United States Magistrate to act as a Special Master under Fed.R.Civ.P. 53. The Magistrate conducted a hearing over two (2) trial days with Garratt being represented by counsel. Counsel had

the right to, and did cross-examine counsel for the Respondent and further called witnesses and presented extensive documentary evidence and written argument. Thereafter, the Magistrate recommended sanctions be imposed in the amount of $14,238.75. After yet another hearing with Garratt having a full and adequate opportunity to appear and be heard through counsel, Judge Gilmore reduced the Magistrate's award to $14,167.50.

On August 8, 1985, Default Judgment was entered in favor of Invst against Chem-Nuclear. Chem-Nuclear appealed the entry of Default Judgment via a timely Notice of Appeal. On October 9, 1985, Judge Gilmore entered an Order for Payment of Actual Attorney Fees to Invst in the amount of $14,167.50 against Garratt to which he filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.

Proceedings In The Court Of Appeals

After Chem-Nuclear secured new counsel, it explicitly elected not to appeal the Motion to disqualify Judge Gilmore that had been filed by Garratt on its behalf. Garratt unsuccessfully attempted to seek review on the merits of the disqualification orders.[6]

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[6] By a separate appeal, No. 85-1732, filed on September 18, 1985, Garratt attempted to appeal Judge Gilmore's denial of Garratt's oral Motion for Recusal made on January 17, 1985 and of Judge DeMascio's February 21, 1985 Order denying Garratt's written Motion to Disqualify Judge Gilmore. The Sixth Circuit, in an Order dated December 9, 1985 (Appendix c), dismissed Garratt's appeal for untimeliness and for lack of standing to challenge the merits of the disqualification Order.

The Chem-Nuclear Appeal

With respect to the merits of Chem-Nuclear's appeal, the Sixth Circuit, in a reported opinion, 815 F.2d 391, 397-400 (6th Cir. 1987); A-8 to A-15, reversed entry of the Default Judgment and remanded the case to the District with directions to set aside the Default, to reinstate Chem-Nuclear's Answer and for further proceedings.[7] Respondent

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[7] The Court of Appeals readily acknowledged that the District Court found that Garratt's *sixteen (16) month* delay in failing to plead or to seek an extension of time under Fed.R.Civ.P. 6(b)(2) was "inexcusable". *See Sony Corp. v. Elm State Electronics, Inc.*, 800 F.2d 317, 319 (2d Cir. 1986) (party seeking enlargement under Rule 6(b) must establish "excusable neglect"); *Traguth v. Zuck*, 710 F.2d 90, 93-94 (2d Cir. 1983) (same); *In Re: Sonoma V*, 703 F.2d 429, 431-32 (9th Cir. 1983) (same); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942) (en banc) (obtaining an enlargement order under Rule 6(b) necessary even when extension is granted by adverse party). Nevertheless it vacated the Default Judgment, expressing its strong disfavor of pretermitted proceedings.

Relying upon its own decisions in *Shepherd Claims Services Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986) and *United Coin Meter Co. v. Seaboard Coastline RR.*, 705 F.2d 839 (6th Cir. 1983), the Sixth Circuit concluded that all ambiguous or disputed facts had to be construed in a light most favorable to the defaulted party and that any doubt had to be resolved in favor of that defaulted party. 815 F.2d at 397-398. While the District Court had determined that the Respondent's counsel's June 25, 1984 revocation of extensions "as to any matter on this file" was unambiguous, the Court of Appeals panel engaged in *de novo* review and determined that the letter was ambiguous, apparently because it was written in the context of a discovery dispute. 815 F.2d at 399-400; A-13. The panel reached this conclusion without making reference to the District Court's supplemental reliance upon Respondent's counsel's other letters of September 17, 1983, December 1, 1983 and February 3, 1984 as well as upon Garratt's numerous oral promises representing he would file responsive pleading.

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must submit that the Court of Appeals ruling with respect to vacating the Default Judgment was erroneous, represents an unwholesome "sporting chance" theory of procedure and encourages a degree of laxity and unprofessional conduct on the part of counsel which has never been recognized by this Court. Indeed, the Sixth Court's employment of a standard of review that is highly deferential to the defaulted party (as opposed to the District Court) has specifically been rejected by recent decisions of other Courts of Appeals. *See Tolliver v. Northrop Corp.*, 786 F.2d 316 (7th Cir. 1986); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1095-06 (7th Cir. 1984); *United States v. DeFrantz*, 708 F.2d 310 (7th Cir. 1983); *Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182 (7th Cir. 1982). *See also Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *amended*, 807 F.2d 1514 (9th Cir. 1987); *Dimmitt & Owens Finc., Inc. v. United States*, 787 F.2d 1186, 1192-93 (7th Cir. 1986). Moreover, when a party has been sanctioned for dilatory tactics as Garratt was here, whether by default, dismissal or other sanction, this Court has been insistent that the District Court's decision be narrowly reviewed by any appellate court under a highly deferential standard—a standard which recognizes the deterrent function such

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In view of the purported ambiguity found by the Court of Appeals, it determined that the Default Judgment had to be vacated to "prevent manifest injustice". 815 F.2d at 400; A-14. Somewhat surprisingly, the panel did this in the context of forthrightly acknowledging that Garratt had been "careless and negligent" 815 F.2d at 400; A-14 and further that he had abused professional courtesies graciously extended to him by counsel for Respondent to the extent of rendering the Federal Rules of Procedure meaningless. *Id.*

sanctions are to generally play within the federal court system. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 641-643 (1976). *See also Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 707-709 (1982); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763-764 (1980).[8] Although the Respondent believes that the Court of Appeals erred in reversing the Default Judgment, Respondent has subse-

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[8] Respondent must note that the Court of Appeals leniency with respect to Garratt's admitted professional negligence in failing to plead for over sixteen (16) months was erroneous if only because of its *de novo* review of the record on the pretext that it was not necessary to show a "glaring" abuse of discretion to upset a Default Judgment. *See* 815 F.2d at 397-399. If nothing else, this action contravened decisions of this Court which strongly defer resolution of factual matters, including imposition of ultimate sanctions, as peculiarly within the District Court's charge and expertise—undertakings which conversely cannot, and should not be duplicated by appellate courts reviewing cold records. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 641-43 (1976) (court of appeals reversed by this Court for leniency evidenced in its opinion reversing a district court's dismissal under Rule 37 as too severe a sanction); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986) (*National Hockey* establishes that ultimate sanction entered by district court is protected by "highly deferential review" by appellate courts). *See also Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1511-12 (1985) (appellate court is not to second guess a district court as to factual matters and must affirm factual findings absent their being clearly erroneous); *Brown v. Wesley's Quaker Maid, Inc.*, 771 F.2d 952, 956 & n.4 (6th Cir. 1985), *cert. denied*, 107 S.Ct. 116 (1986) (same).

These decisions establish the narrow scope of review that should have been employed by the panel with respect to the Default Judgment. Of even greater significance, they underscore the fact that the Sixth Circuit gave Garratt the benefit of every doubt in rendering its opinion—affording him far more protection than he deserved or was entitled to—and still determined that his conduct in filing the Motion to Disqualify Judge Gilmore was unquestionably sanctionable.

quently resolved its dispute with Chem-Nuclear in the underlying District Court action which has been dismissed with prejudice pursuant to a settlement between those parties.

The Matter Of Sanctions

The Court of Appeals then turned its attention to the matters of sanctions against Petitioner, Garratt. The Court initially noted that once a violation of Fed.R.Civ.P. 11 was found, the District Court was required to impose sanctions under Rule 11 as modified by its 1983 Amendments. 815 F.2d at 391; A-17, *citing, Albright v. Upjohn Co.*, 788 F.2d 1217, 1221-22 (6th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985); *Davis v. Veslan Enterprises,* 765 F.2d 494, 497 (5th Cir. 1985); advisory committee notes to 1983 amendments to Rule 11. Although the panel recognized the District Court's imposition of sanctions was to be reviewed under the limited abuse of discretion standard, 815 F.2d at 401-402; A-17, it nevertheless engaged in a careful—and what was tantamount to a *de novo*—review of the record regarding sanctions.

With respect to Garratt's Motion to Dismiss for Insufficiency of Service of Process under Fed.R.Civ.P. 12(b)(5), the panel readily determined that "even a cursory review of Rule 12 would have revealed the defense lacked any foundation in law" and affirmed Judge Gilmore in properly sanctioning Garratt for filing it. 815 F.2d at 403; A-20. The Court also determined that Judge Gilmore's characterization of this argument as "outrageous" constituted an understandable response to a Motion that was patently without merit. 815 F.2d at 402-03; A-19, 20.

The Sixth Circuit reversed entry of sanctions against Garratt for filing the Motion for Summary judgment, reasoning that although Garratt's pleadings had been stricken at the time he filed the Motion for Summary Judgment on November 30, 1984, the Motion for Summary Judgment did not violate any procedural rule and raised potentially meritorious defenses. Accordingly, it determined that sanctions were not appropriate with respect to that Motion.[9] Respondent has not elected to burden this Court with a cross-petition for certiorari challenging this ruling because this case simply does not warrant review of any type in this Court.

As Garratt has not elected to petition this Court to review the Court of Appeals' affirmance of the sanction imposed upon him for filing the clearly frivolous Motion to Dismiss, the only aspect of the Court of Appeals' ruling that is before this Court is the Sixth Circuit's affirmance of District Judges Gilmore's and DeMascio's sanctioning Garratt for filing the clearly frivolous Motion for Disqualification of Judge Gilmore. In its ruling, the Sixth Circuit recognized that Rule 11 as amended requires the imposition of sanctions when a pleading, motion, or other court paper 1) is not well grounded in fact; 2) is not warranted by existing law or a good faith argument for extension of existing law; or 3) is filed for an improper purpose such as delay. The Court found that Garratt's Mo-

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[9] Respondent continues to maintain that because Chem-Nuclear's pleadings had been stricken such that it was unable to defend as to the merits of the suit, Chem-Nuclear was in a state of default which precluded Garratt from filing a Motion for Summary Judgment. *See Thomson v. Wooster,* 114 U.S. at 114; note 4 *supra*.

tion for Disqualification violated all three (3) sanctionable circumstances of Rule 11. 815 F.2d at 402; A-18. First, the Motion was not well grounded in fact because Garratt advanced no new facts or legal arguments to support the Motion. In fact, the panel found it to be identical to ones that had been filed in other cases and denied by Judges Guy and Churchill.

Second, the Court of Appeals also readily determined that Garratt's Motion was not warranted by existing law or a good faith argument for extension of existing law. The explicit holding of *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) required proof of extrajudicial prejudice or bias thus rendering irrelevant the actions of a judge in pending or previous litigation as grounds for disqualification. 815 F.2d at 402; A-19. Garratt's motion supported by his own conclusory affidavits flagrantly ignored this clearly controlling precedent. Garratt's citation of cases that he contended represented an exception to this general rule were readily rejected by the Court of Appeals as not remotely similar factually. 815 F.2d at 402-403; A-19, 20. The fact that Judge Gilmore commented that certain of Garratt's legal arguments were "outrageous"—and in fact were outrageous—wasn't remotely similar to the injudicious comments made in the cases Garratt purported to rely upon.

Third, as anyone familiar with the record would have to conclude, the panel quickly determined that Garratt transparently filed the Motion for Disqualification to delay the Default Judgment hearing. 815 F.2d at 402; A-18. The Court also recognized that Garratt's Motion was un-

timely since it was brought not at the beginning, but at the conclusion of the case. 815 F.2d at 402; A-18.

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REASONS WHY THE WRIT SHOULD BE DENIED

Introduction

Garratt now seeks review in this Court of the award of sanctions against him for filing the Motion to Disqualify Judge Gilmore raising yet another frivolous claim (Pet. for Cert. Question 1) that such violates his First and Fifth Amendment rights guaranteed by the Constitution of the United States. He also reiterates his argument (Pet. for Cert. Question 2) made to the Court of Appeals that his Motion for Disqualification of Judge Gilmore was justified in view of his self-serving declaration of actual or apparent bias or prejudice on the part of Judge Gilmore.

I.

THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW IN THIS COURT AND, MOREOVER, ARE FRIVOLOUS.

Initially, the Court should note that Garratt seeks review of factual determinations made by the District Court to the effect that no bias or prejudice within the meaning of 28 U.S.C. § 144, § 455 was established. In Garratt's petition for certiorari (Question 2) he seeks *de novo* review in this Court of those factual determinations claiming that bias was shown 1) by the District Judge's acceptance of Respondent's counsel's June 25, 1984 letter as unambiguously revoking any extensions of time previously ex-

tended to Garratt and 2) by the District Judge's failure to vacate the Default Judgment. Apparently, Garratt believes that because the Sixth Circuit ultimately determined that the District Judge erred in making those findings and determinations, he has established bias. This in itself constitutes yet another violation of Rule 11 since it is manifest that a judge cannot be recused because he commits error. As Circuit Judge Aldridge recently stated, "a judge cannot be acceptable if he finds in your favor, but unqualified when he finds against you. This is classic heads-I-win, tails-you-lose". *Ricci v. Key Bancshares of Maine, Inc.*, 111 F.R.D. 369, 377 (D.Me. 1986).

Garratt further compounds his lack of good faith regarding his second question presented for review by contending 3) that his Motion to Disqualify Judge Gilmore was justified in view of his claim that the Judge made a "Freudian slip" at one of the hearings by calling the case "*Invst v. Garratt Chem-Nuclear*". The official Court Reporter that transcribed the particular hearing, however, certified that the District Judge made no such statement. Although Garratt concedes this was never part of the record and indeed, that he was unsuccessful in getting the Court of Appeals to correct the record to reflect *his* recollection of how the case was called, he nevertheless continues to belabor such an irrelevancy in this the highest Court in the land.

Garratt's "constitutional issue" (Question 1) is equally meritless. Indeed, the argument that Garratt was denied the opportunity to be heard is frivolous and offered in bad faith. As the Court of Appeals expressly noted, Garratt was given far more adequate process than was due him,

815 F.2d at 405; A-24, 25, being permitted to express his views in multiple hearings before, and presentations to two (2) United States District Judges and a United States Magistrate. Indeed he retained counsel who had an unencumbered right to cross-examine Respondent's counsel, to call, examine and cross-examine other witnesses and to present documentary evidence. Further, the record in this matter is full of his prodigious written arguments and presentations. Equally outrageous is Garratt's claim of a denial of due process because Judge Gilmore acted as "accuser, fact finder, judge and executioner" (Pet. 12) in the face of the fact that one United States Magistrate, two United States District Court Judges, and a panel of the United States Court of Appeals have duly considered and rejected Garratt's contentions.

Garratt's constitutional claims under the First Amendment are not only frivolous, but hardly comprehensible. Apparently, Garratt believed he enjoys some absolute, First Amendment right to make frivolous Motions for Disqualification. He attempts to justify this belief by sweepingly grand and thunderous references to the Court of Appeals' decision precipitating an "apocalyptic" inhibition of lawyers from zealously representing their clients (Pet. 13) and of the advent of "judicial tyranny". (Pet. 20). Garratt says the Court of Appeals' ruling will also have "a chilling effect" on attorneys' zeal to represent their clients' interests. This position is untenable and begs the question. Garratt's Motion for Disqualification has been found frivolous and sanctionable by two (2) District Judges, a Magistrate and a panel of the Court of Appeals. If it is his contention that the First Amendment gives him absolute immunity to file such frivolous pleadings and to

subvert and delay the judicial process, then his understanding of that Amendment is thoroughly out of touch with any of the decisions of this Court. In fact, the 1983 Amendments to Rule 11 were actually *designed and intended* to have a "chilling effect" upon conduct such as Garratt's. This Court has on more than one occasion construed (and applauded) sanction provisions of the Federal Rules of Civil Procedures so as to serve the important deterrent function of inhibiting unacceptable delay and misconduct. *National Hockey League*, 427 U.S. at 642-43 (Rule 37 sanctions).

Correlatively, if Garratt's conention is that his Motion to Disqualify should have been granted, then his claims have nothing to do with the First Amendment but instead simply turn upon the legal sufficiency of the Motion. As the District Judges and the Court of Appeals properly found, the motion had no merit whatsoever.[10]

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[10] As earlier described, Chem-Nuclear did not appeal the merits of Judge DeMascio's denial of the Motion to Disqualify Judge Gilmore. The Court of Appeals further held in Garratt's appeal No. 85-1732 that Garratt did not have standing to challenge the merits of that Disqualification Order and did not perfect that appeal in any event. Garratt did not seek review in this Court of that ruling. Therefore, Judge DeMascio's ruling denying the Motion to Disqualify is the law of the case which cannot be reviewed by this Court. This makes Garratt's Petition particularly unsuited as a vehicle for this Court to generally discuss the interrelationship between Rule 11 and disqualification as Garratt suggests.

II.

THE COURT OF APPEALS WAS FULLY JUSTIFIED IN AFFIRMING THE IMPOSITION OF SANCTIONS AGAINST THE PETITIONER UNDER UNIVERSALLY RECOGNIZED PRINCIPLES OF LAW AND THEREFORE REVIEW IN THIS COURT IS NOT WARRANTED.

The Sixth Circuit, Judge DeMascio and Judge Gilmore relied upon the Sixth Circuit's decision in *Southerland v. Irons,* 628 F.2d 978 (6th Cir. 1980) in finding Garratt's Motion for Disqualification wanting under Rule 11. The *Southerland* case clearly had recognized the "well settled [rule] that actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification". *Southerland,* 628 F.2d at 980, *citing Sexton v. Kennedy,* 519 F.2d 797 (6th Cir. 1975); *Knoll v. Socony Mobil Oil Co.,* 369 F.2d 425, 430 (10th Cir. 1966), *cert. denied,* 386 U.S. 977 (1967); *Barnes v. United States,* 241 F.2d 252 (9th Cir. 1956). The Sixth Circuit was completely correct in its articulation of this rule and in its recognition of the fact that Garratt's effort completely ignored or discounted the universal character of its application.

To demonstrate the strength of this point, one need only look to the recent decision of *Aetna Life Ins. Co. v. Lavoie,* 106 S.Ct. 1580, 1584-85 (1986) wherein this Court recognized the traditional common-law rule that disqualification for bias or prejudice was not permitted. "As Blackstone put it, 'the law will not suppose a possibility of a bias or favour in a judge, who has already sworn to administer impartial justice, and whose authority greatly

depends upon that presumption and idea.' " *Id., citing* 3 W. Blackstone, Commentaries, * 361. This Court further noted, however, that "the more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice". *Aetna Life Ins. Co.,* 106 S.Ct. at 1585.

Aetna Life Ins. involved a challenge under the due process clause to a court's refusal to disqualify one of its justices when no intervening regulation or statute controlled the terms of such disqualification. By contrast, Acts of Congress, 28 U.S.C. § 144, § 455, far exceeding the minimal constitutional requirements of the due process clause, control the situations under which a presiding federal judge may be recused. Accordingly, it is those statutes which controlled the determination as to whether or not Judge Gilmore should have been disqualified from presiding over the underlying action and whether or not Garratt violated Rule 11 in seeking Judge Gilmore's recusal.

The plain language of those provisions, and indeed of the first clause of 28 U.S.C. § 144, establish the frivolousness of Garratt's Motion for Disqualification. 28 U.S.C. § 144 provides in part that, "[w]henever *a party* . . . makes and files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against *him* or in favor of any adverse party. . . ." (emphasis supplied). As already noted, it was Garratt—the attorney for Chem-Nuclear—that filed an affidavit in this case, not a representative or officer of Chem-Nuclear.

The statute has two (2) significant ramifications with respect to its choice of the term "party". First, the plain

meaning of the literal word "party" requires that a "party", not an attorney be the affiant. Several Courts of Appeals have construed the statute's reference to "party" as not to include counsel within its sweep. *See, e.g., Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1050 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States v. IBM Corp.*, 475 F.Supp. 1372, 1383 (S.D. N.Y. 1979). *Cf. also United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); *Giebe v. Pence*, 431 F.2d 942, 943 (9th Cir. 1970).

Second, the statute, in view of its use of the terms "bias" and "prejudice" as being the touchtones which trigger disqualification, have universally been interpreted as terms of art to refer to a judge's actions or conduct occurring outside of the performance of his or her judicial duties. As those decisions unequivocally state, the only type of bias or prejudice which will warrant disqualification is "extradjudicial" bias or prejudice. This Court squarely established such a construction when it stated that, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case". *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), *citing, Berger v. United States*, 255 U.S. 22, 31 (1921) (same). *See also Moore v. McGraw Edison*, 804 F.2d 1026, 1032 (8th Cir. 1986) (antipathy toward an attorney is not indicative of extrajudicial bias against a party); *United States v. Pugliese*, 805 F.2d 1117, 1125 (2d Cir. 1986); *In Re: IBM Corp.*, 618 F.2d 923, 928 (2d Cir. 1980); *Davis*

v. Board of School Commissioners, 517 F.2d at 1052 (controversy with lawyers in the matter at bar does not constitute extrajudicial conduct). The fact that the Sixth Circuit in *Southerland* followed the rule set down by this Court in *Grinnell* and *Berger* and followed by other Courts of Appeals underscores the frivolousness of Garratt's Motion.[11]

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[11] Simply put, "antipithy to an attorney is insufficient grounds for disqualification of a judge because it is not indicative of extrajudicial bias against a party". *Moore v. McGraw Edison*, 804 F.2d at 1032. Garratt's attempt to fall into some exception to this overarching principle was also frivolous. Namely, Garratt claimed two (2) decisions recognized limited circumstances where bias or prejudice directed toward an attorney might give rise to a need for a judge to be disqualified. *See* Pet. at 12, *citing, Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979); *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

Nicodemus, which was authored by Judge Keith who sat on the panel of the Sixth Circuit in this matter, determined that a district judge had to be disqualified for making flagrantly inappropriate and intemperate remarks from the bench about a *party* and its representatives. Moreover, the district judge also rendered a retaliatory award of damages against that litigant, notwithstanding his admission that such was not necessarily justified under substantive law but rather was a measure designed to punish the litigant.

Garratt's attempt to rely upon the *Ritter* decision was equally misplaced and frivolous. There, the Tenth Circuit deemed it appropriate to disqualify the district judge because, *inter alia*, he was caustic and overbearing toward counsel for the government and expressed, on the record, his belief that the recusal efforts were calculated to impugn his integrity and that of the attorney for the government's adversary, one Mr. Christensen. Christensen was President of the Utah State Bar Association and had forestalled Bar efforts to recommend impeachment and disability proceedings against the district judge. The Court of Appeals found the record full of references to Judge Ritter's extreme deference to, and protection of Christensen, as well as to the district judge's concern about the impact of the court proceedings upon Christensen's career and dealings outside of the pending case.

III.

OTHER FACTORS, NOT EXPRESSLY RELIED UPON BY THE SIXTH CIRCUIT, ESTABLISH THAT GARRATT'S MOTION TO DISQUALIFY JUDGE GILMORE WAS SANCTIONABLE UNDER RULE 11.

It is well established that a Respondent in this Court may urge on appeal reasons for affirmance not relied upon by the lower courts. *California Bankers Ass'n v. Schultz,* 416 U.S. 21, 71 (1974); *United States v. American Ry. Express Co.,* 265 U.S. 425, 435 & n.10 (1924); *The William Bagaley,* 72 U.S. (5 Wall.) 377, 412 (1866). Most significant in this regard was Garratt's patent violation of the necessity of bringing the Disqualification Motion in a timely fashion. Timeliness had squarely been laid down by Sixth Circuit as an absolute requisite to pursuing a motion to recuse in *Crowder v. Conlan,* 740 F.2d 447, 453-54 (6th Cir. 1984). Indeed, the necessity for seeking recusal at the earliest possible moment is something expressly mandated by the terms of 28 U.S.C. § 144. The observations of the First Circuit made long ago are directly apposite. "The requirement of timeliness is of fundamental importance. The first ground of the affidavit is untimely as a matter of law. *We do not see how anyone could read the statute and think otherwise.* Petitioner knew of this circumstance for two and one-half years and said nothing". *In Re: United Shoe Machinery Corp.,* 276 F.2d 77, 79 (1st Cir. 1960) (emphasis supplied). Here, Garratt claimed that Judge Gilmore was biased or prejudiced against him and that that bias or prejudice had been expressed in previous cases. Nevertheless, Garratt did not elect to bring such matters up until after his pleadings

were struck. In fact, he did not move for recusal until the very day the District Court was to have conducted the Default Judgment hearing. Again, as the First Circuit noted, "one of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives". *Id.*

Finally, it should be noted that Garratt is misplaced in his sweeping claim that absent this decision, there are no federal cases dealing with the imposition of Rule 11 sanctions in the context of filing a motion for disqualification. In *Ricci v. Key Bancshares of Maine Inc.,* 111 F.R.D. 369, 377-378 (D.Me. 1986) Circuit Judge Aldridge sitting by designation imposed sanctions for filing a similarly frivolous motion for recusal. As here, the motion for recusal was not filed until well after a pattern of dilatory tactics and delays had been established on the record. Judge Aldridge found the motion untimely and sanctionable. "In sum, the motion was both too late and too little". *Id.* Like Garratt, counsel made the argument in *Ricci* that the unprofessional conduct was justified and not sanctionable by claims of "advocacy and zeal" by the attorney on behalf of his client. This contention was squarely rejected by Judge Aldridge's observation that the legal research undertaken by the attorney "should surely have revealed, if common sense had not, the impropriety of using recusal as a second string to their bow . . . As to delay, it is only too apparent that this was the purpose [of the motion]". *Id.* Building on Shakespeare (Hamlet, IV, iii, 9) Judge Aldridge observed that "in court desper-

ate diseases are not to be relieved by desperate appliances. Sanctions are clearly in order." *Id.* at 377-78.

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CONCLUSION AND RELIEF REQUESTED

As this Response should demonstrate, two (2) District Judges and a panel of the Court of Appeals agreed that the Petitioner had to be sanctioned under Fed.R.Civ. P. 11 for filing a clearly frivolous Motion to Disqualify Judge Gilmore. Garratt's filing of the petition for certiorari may itself constitute a violation of Rule 11 as he continues to pursue, even in this Court, his frivolous arguments. Moreover, he has further demonstrated bad faith by presenting what are unquestionably frivolous constitutional arguments to which Respondent has been required to respond.

WHEREFORE, Respondent, INVST FINANCIAL GROUP, INC., prays that the Court deny the petition for certiorari and enter an order awarding Respondent costs and attorney fees.

Respectfully submitted,

BUSHNELL, GAGE, REIZEN & PATTON

By: JOHN K. PARKER (P29563)

Attorneys for Respondent

DATED: October 8, 1987

APPENDIX a

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may in-

clude an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX b

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INVST FINANCIAL GROUP, INC.,
a Michigan corporation,

Plaintiff,

v. Civil No. 83CV2217DT

CHEM-NUCLEAR SYSTEMS, INC.,
a foreign corporation,

Defendant.
_____/

ORDER

This matter is before the court on defendant's motion to disqualify the presiding judge in this action, pursuant to 28 U.S.C. § 144 (1949). Initially, we note that, under § 144 (actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. Person bias based upon extrajudicial actions must be shown. *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980).

It is clear to this court that defendant is claiming no personal bias on the part of Judge Horace Gilmore. Defendant's allegations of bias all concern judicial actions taken by the presiding judge in the present and past cases in which defendant's counsel has appeared. This is an insufficient basis for disqualification.

Additionally, we have reviewed the procedural history of this lawsuit. We are of the opinion that, in bringing this motion, defendant is compounding a demonstration of lack of good faith in the defense of this action. While we believe that this motion presents an appropriate basis for the imposition of sanctions under Fed. R. Civ. P. 11, such action is more appropriately left to the assigned judge.

NOW, THEREFORE, IT IS ORDERED that defendant's motion to disqualify presiding district judge pursuant to 28 U.S.C. § 455 [sic] be and the same hereby is DENIED.

/s/ Robert E. DeMascio
United States District Judge

Dated: Feb. 21, 1985

APPENDIX c

No. 85-1732

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:	
C. WILLIAM GARRATT, AND GARRATT & MORRIS, P.C.	
Petitioners-Appellant	
INVST FINANCIAL GROUP, INC., A MICHIGAN CORPORATION,	ORDER
Plaintiff-Appellee	(Filed Dec. 9, 1985)
v.	
CHEM-NUCLEAR SYSTEM, INC., A FOREIGN CORPORATION,	
Defendant	

BEFORE: KEITH, KENNEDY, and KRUPANSKY, Circuit Judges

This matter is before the Court upon plaintiff's motion to dismiss the appeal of William C. Garratt.

On September 18, 1985, Garratt filed a notice of appeal from the orders of January 17, 1985 in which Judge Gilmore denied Garratt's oral motion to disqualify himself and on February 21, 1985 Judge DeMascio denied

Garratt's written motion to disqualify Judge Gilmore, stating also that sanctions should be imposed on Garratt pursuant to Federal Rule Civil Procedure 11. On April 24, 1985, the district court ruled that sanctions would be imposed on Garratt and referred the matter to a United States Magistrate pursuant to Federal Rule of Civil Procedure 53. On August 6, 1985, the Magistrate recommended that sanctions be imposed against Garratt in the amount of Fourteen Thousand Two Hundred Thirty Eight Dollars and Seventy Five Cents ($14,238.75), however this recommendation was not adopted by the district court until October 8, 1985 thereby rendering Garratt's notice of appeal filed on September 18, 1985 premature since there was no final order regarding the issue to which Garratt had standing. Garratt further failed to perfect his appeal once the district court entered its final order regarding the imposition of sanctions.

It is ORDERED that the motion to dismiss be and hereby granted.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk